REPORTS

OF

IMPORTANT CASES

Heard and Determined

BY THE

SUPREME COURT OF CEYLON,

DURING THE YEARS

1863–'68.

BY

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ADVOCATE.

COLOMBO.

PRINTED BY JACOB DE LEEMA.

1881.

PREFACE.

In 1874, I determined to present the profession with a complete series of law reports, the need of which was urgently felt, for the thirty years comprised in the following periods, viz :—

1820—1833
1847—1855
1860—1868.

I read through the *Civil Minutes* of the Supreme Court and collected all the important decisions delivered by it during the 30 years in question, and where the decision did not set forth the facts of the case, I had to obtain them from the case books of the several Courts of the Island. This work occupied me for three whole years, till the end of 1876.

In 1877, I published the reports for 1820-33, and Mr. Grenier having finally abandoned his idea of reporting for current years, I felt bound to defer my scheme of reporting for past years and to report for 1877. The publication of these new reports was financially a success. While I was reporting for 1878, I was called upon to edit the *Supreme Court Circular*, which I did till May 1879, and I am deeply thankful to Sir John Phear for the manner in which he alluded to me in a letter written by him to H. E. the Governor on the eve of his, Sir John's, departure from the colony, a few months after my appointment to the Legislative Council. He said,—

"* * * I cannot close this letter without stating to Your Excellency that I desire to acknowledge my high appreciation of the readiness with which Mr. Râma-Nâthan yielded his own private enterprise in favour of the *Supreme Court Circular*, when the latter was proposed by me, and also the loyalty with which he has ever since supported the new publication, gratuitously giving his own personal services towards maintaining it. In his present position, he does not, I believe, consider that he could undertake the conduct of these reports for pay from Government. He has thus unquestionably suffered considerable pecuniary loss by sacrificing his personal interest out of a liberal minded consideration for the general advantage of the public and the profession. And although he does not himself ask for compensation, still I venture to think that this public spirit, at least, deserves some fuller recognition, if it could be extended to him, than the mere thanks of the Judges however cordially accorded."

After resigning the editorship of the *Supreme Court Circular*, I reverted to my original scheme and published the reports for 1860-62.

I now issue the reports for the years 1863-1868. The index to this volume is full for the first 109 pages, but thereafter I had no time to do more than give the "catch words" of the cases. I regret this much, for I have had little inducement for the labour I am bestowing on the fulfilment of my scheme save the satisfaction of aiding in the administration of justice.

This volume will supersede Mr. Crowther's reports for 1863, and the irregular numbers of Beven and Mill's *Legal Miscellany*, to both of which publications, now out of print, I must acknowledge my indebtedness.

Colombo,
August, 1881.

P. RÂMA-NÂTHAN.

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A suit for probate is a suit to determine the validity of the testament, and is also for a claim for a trust. The probate "which commits the administration of the estate to the executors named in the will," is a final award of the specific thing sued for by plaintiff.

The fact that probate is followed by the inventory and account does not make the probate any the less the final order in the case, because the inventory and account are ordered and decreed in the probate itself and all that the court subsequently does is to see its own decree carried out.

But though the sentence of probate is a final order, an appeal therefrom to the Supreme Court does not require that security should be given, because the subject of litigation is neither "movable property, debt, personal demand or land affected in its actual occupation," but only the validity of a testament.

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The renter was referred to a civil action and the fine, on recovery, ordered to be deposited in the Kachcheri.

Any settlement out of court which the accused may enter into with the informer as to the moiety of the fine, cannot be recognised by the court.

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The absence of reasonable or probable cause is in itself evidence, though not conclusive evidence, of malice.

Where the writ had not been set aside for irregularity, the tort lies in communicating an improper direction to the process of the law, and therefore it is necessary for plaintiff's case to prove not only the arrest, but that the arrest was made maliciously and without reasonable or probable cause.

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As the misconduct of the defendant may aggravate the amount of damages, so the misconduct of the plaintiff will reduce his claim thereto.

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The law as to presumption and disproof of consideration in respect of a bond, is in Ceylon precisely the same as to presumption and disproof of consideration in respect of a promissory note or bill of exchange.

The instrument is itself *prima facie* evidence of the consideration.

Evidence, written or parol, is equally admissible to prove want of consideration.

The recital in the bond of receipt of the money does not estop the obligor from leading evidence of want of consideration, any more than the words "for value received" would estop the maker of a promissory note.

D. C., Galle, 14,502, *Civil min.* 18th June 1851, followed.

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Where the editor of a newspaper was charged with contempt and disobedience of an order of a general Court Martial, and was prosecuted therefor before the District Court,—*held* that the jurisdiction of the District Court was too limited to try a case of such a serious nature, and that the Queen's Advocate has not the right to limit the punishment with which an offence is to be visited, by prosecuting the offender before a court which is incompetent to pronounce a full sentence.

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The words "right of prosecution" in that clause means the right to commence a prosecution, and the commencement of the prosecution dates from the information before the J. P.

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R. v. Brooks, 1 Den. C. C., 217 cited.

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The English law against cheats and false pretences is analogus in Roman and Roman Dutch law, to *stellionatus* or *falsitas,* cheating.

Where a kangani falsely pretended to a superintendent of an estate that he had 20 coolies under him and would bring them to the estate to work under the superintendent, and by means of these false pretences obtained from him and duly cashed, a money order for £10 with intent to defraud, *held* that the kangani's conviction on the count for false pretences was sustainable under the law of Ceylon as a case of *stellionatus.*

Held also, that the above facts did not justify a conviction on the count for theft.

Semble—It would have been theft, had the jury found that the prosecutor gave the money order to the prisoner not for him to treat it as absolutely his own, but with the specific purpose that it should be employed in paying off the arrears of the supposed coolies at the other estate and in bringing them to the prosecutor, but that the prisoner appropriated the money in contraveution of that purpose.

The practice of coupling count for theft with count for cheating (false pretences) recommended.

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The expenses of the defendant cannot be adjudged to him in the

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A wife in Ceylon has a right to sue her husband for maintenance only where in England she would have a right to pledge his credit.

The husband is bound to maintain his wife so long only as she remains faithful to her marriage vow.

She who violates her vow has no longer any claim upon her husband, and misconduct of the husband is no excuse in point of law for the adultery of the wife.

The wife's adultery before or after desertion is a proper subject of enquiry in a suit for maintenance.

The Kandyan Marriage Ordinance does not affect the liability of the husband to be sued for maintenance.

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2.—*Last will—common property—bequest by husband—disposal of property not his own—intention of testator—claim of widow jure uxoris to her share—election by widow between bequest and her share—law of Ceylon.*

A husband in his last will made various bequests out of what he termed *his* movable and immovable property, but which was really property which he owned in community with his wife. He gave a legacy to his wife, but it did not appear whether the testator intended to deal with the whole of the joint marital property or only with his own moiety of it. *Held* that the English doctrine of election on the part of the widow between dower and legacy did not apply to Ceylon, but that the widow was entitled to her moiety of the joint property and to her legacy.

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A warrant under the hand of a justice of the peace directed in due form to a private person enables, but does not oblige, him (under cls. 150 and 161 of Ordinance No. 11 of 1868), to execute it.

The direction of a warrant is not mere matter of form, but of substance. *King* v. *Meir*, cited.

Thus where a warrant was directed to the defendant, not by name but in the words "to the police serjeant of Kaduganawe," his refusing to execute it, cannot be treated as refusal by a private person.

Nor could his refusal as a police officer be treated as an offence under

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clause of Ordinance No. 15 of 1843, because, he being an officer of the police force, the warrant should have been directed, under cl. 17 of Ordinance 17 of 1844 [cl. 63 of Ordinance No. 16 of 1865], to the superintendent.

P. C., Kandy, 56,658 37

2.—*Justice of the peace—liability for wrongful act—Ordinance No.* 8 *of* 1844, *cl.* 6—*search for lottery—power to seize and detain—trespass ab initio.*

D. C., Galle, 22,408 176

Kandyan law.

1.—*Adoption of practices not Kandyan—effect of such adoption—marriage—inheritance.*

C. R., Dambool, 3,079 130

2.—*Deed of gift—revocability of.*

D. C , Ratnapura, 8,142 195

3.—*Deed of gift—clause of disinherison.*

D. C., Matale, 1,955 211

4.—*Deega marriage—inheritance—brothers and sisters of the half blood.*

C. R., Rangalle, 1,222 225

5.—*Disinherison—marriage with low caste man—wrong-doer.*

D. C., Kurunegala, 14,559 49

6.—*Interest of widow in the family paraveni property.*

D. C., Kandy, 33,964 190

See HUSBAND AND WIFE.

Labor Ordinance.

1.—*Carpenter—contract to saw timber—servant.*

P. C., Panwille, 8,644 229

2.—*Desertion of service—non-payment of wages.*

A servant whose wages, except so far as regards some inconsiderable set-off, have not been paid to him for 5 months, who has summoned his employer for this wages and warned him that leaving the service will be

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the consequence of non-payment, has reasonable cause for leaving when he finds that payment is still withheld.

P. C. Trincomalee, 1,133 (June 10th 1853) commented on.

P. C., Newera Eliya, 4,927 27

3.—*Labor Ordinance—notice to quit—subsequent waiver of such notice.*

P. C., Badulla, 9,491 148

4.—*Labor Ordinance cl.* 11—*interpretation—"other like" servant—kangani—pioneers.*

P. C., Colombo, 100,361 288

5.—*Master and servant—estate cooly.*

A cooly engaged at a daily rate of wages for every working day, the wages being payable monthly, is a monthly servant, and is bound to give the usual notice of quitting service.

P. C., Kandy, 56,486 9

Land.

1.—*Boundaries of—prosecution under Ordinance No.* 1 *of* 1844, *cl.* 1 —*evidence of demand.*

P. C., Panwilla, 4,510 143

2.—"*Interest in land*"—*Ordinance No.* 7 *of* 1840—*sale of coffee growing on trees.*

The sale of crops of fruits growing on trees, such as coffee, is a sale of an interest in land.

D. C., Kandy, 32,039 123

3.—*Ordinance No.* 1 *of* 1844, *cl.* 8—*liability of occupant to share in renewal of defective boundary—nature of boundary.*

D. C., Colombo, 47,823 311

See SALE.

Land-owner.

1.—*Land-owner and cultivator—claim for share of crop—Ordinance No.* 7 *of* 1840—*rights of cultivator to compensation for work done.*

C. R., Kandy, 31,530 129

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Lease.

1.—*Action by lessee against prior lessee—wasteful damage.*

An action lies to a lessee against a prior lessee for wasteful damage to the estate committed by the prior lessee, whilst that prior lessee's lease was still current, and before the term of the plaintiff's lease had commenced, but after the plaintiff's lease, which was to commence *in future*, had been executed.

The liability of the defendant depends upon an obligation arising out of delict to make compensation to the plaintiff for the damage committed at a time when the plaintiff had acquired a lawful interest in the property.

C. R., Matara, 14,938 8

2.—*Cause of action—lease—situation of land—place of execution of lease.*

C. R., Galle, 33,592 294

3.—*Lease—Ordinance No.* 8 *of* 1834, *cl.* 3—*prescription.*

C. R., Galle, 31,039 186

See USE AND OCCUPATION.

Libel.

See DEFAMATION.

Lottery.

See JUSTICE OF THE PEACE, 2.

Maintenance.

1.—*Leaving wife without maintenance—desertion of the wife—adulterous cohabitation of the husband with another woman.*

If a husband forcibly expels his wife from her house and keeps her from it by threats of violence; or if, by cruelty or by threats of personal violence, or by indecent and shameful conduct, or by bringing home a loose and immoral woman and treating her as a member of his family, he renders it morally impossible for her to continue to cohabit and reside with him, and she accordingly leaves him and is without maintenance, so that she requires to be supported by others,—the husband has, in the meaning of the Ordinance, *left* her without maintenance.

P. C., Panadura, 4,620 64

2.—*Maintenance—Ordinance No.* 4 *of* 1841, *sec.* 4—*notarial agreement not to sue.*

It is no defence to a charge of leaving one's illegitimate children

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without maintenance, that the mother received a lump sum and agreed to make no further demands on the defendant.
P. C., Galle, 47,807 87

3.—*Maintenance—evidence of wife against husband.*
The wife is not a legal witness against the husband on a charge of leaving wife without maintenance.
Reeve v. *Wood*, W. Rep. 13, p. 154 followed.
P. C., Kal. Batticaloa, 7,172 139

4.—*Maintenance—Mahomedans—divorce—validity of plea.*
P. C., Galle, 51,227 140

5.—*Maintenance—autre fois acquit—wife living on husband's credit—ability of wife to maintain herself—evidence—presumption.*
P. C., Kal. Batticaloa, 7,211 141

6.—*Maintenance—Mohamedans—divorce.*
C. R., Batticaloa, 7,467 144

7.—*Maintenance—demand for.*
P. C., Panwille, 4,890 151

8.—*Maintenance—ability of wife to maintain herself—duty of husband—procedure—evidence.*
P. C., Batticaloa, 7,493 151

9.—*Maintenance—mother of illegitimate children.*
P. C., Matara, 43,806 153

10.—*Maintenance—" chargeable to others."*
P. C., Harrispattu, 8,713 210

11.—*Unmarried mother—support by her of illegitimate child—Ordinance No. 4 of 1841, cl. 3—" chargeable to and require to be supported by others"—prescription.*
An illegitimate child supported by its unmarried mother is a child requiring to be supported by " others."
The offence of maintenance is not completed until the chargeability of the children to others happens, and it is sufficient if the plaint is laid within the prescription period of that event.
P. C., Galle, 47,251 64

Malicious injuries.

1.—*Ordinance No. 6 of 1846, cl. 19—fair and reasonable belief.*
P. C., Kaigalle, 19,382 45

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Marriage.

1.—*Presents in contemplation of marriage—refusal to marry—claim for restitution of parents.*
D. C., Ratnapura 8,613 226

Master and servant.

1.—*Master and servant—leaving without notice—sufficiency of notice—claim of master to damages for unjustifiable leaving.*
C. R., Colombo, 42,133 188

Minor.

1.—*Minor—prescription—applicability of saving clause of ordinance, where there are guardians.*
D. C., Jaffna, 16,643 335

2.—*Trader—his liability on contract.*
D. C., Colombo, 25,396 119

Mortgage.

1.—*Mortgage of movables not in esse—Ordinance 7 of 1840—its object.*
D. C., Colombo, 512 219

2.—*Mortgage by one of several executors—sale by mortgagee—purchase thereunder—action by co-executor for cancellation of sale and for mesne profits—his right to maintain the suit—bona fides of the mortgage—want of authority in the mortgagor to mortgage—collusion between mortgaging executor and mortgagee—knowledge on the part of the purchaser of questionable title—collusion between mortgagee and purchaser.*
Hadden v. Gavin (D. C., Kandy, 37,801) 246

3.—*Special mortgagee—claim by creditor for upkeep of estate—preference.*
D. C., Colombo, 45,376 282

See FISCAL, 5.
PAWN.
SALE, 4.

Municipal Council Ordinance.

1.—*Ordinance No. 17 of 1865, cl. 55—"kept or used"—liability of carts &c. to tax.*
B. of M., Kandy, 2,381 336

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New trial.

1.—*Application for new trial—discovery of fresh evidence—power of Supreme Court to grant new trials.*
D. C., Kandy, 45,254 325

Nuisances.

1.—*Ordinance No. 15 of 1862, cl. 1, sec. 11—deposit of cocoanut husks—act of agent act of principal—injury to health—evidence—difference between common law nuisance and statutory nuisance.*
D. C., Jaffna, 463 115

2.—*Ordinance No. 15 of 1862, cl. 1 sec. 6—common occupation—liability of several occupants.*
P. C, Galle, 58,288 211

Oath.

1.—*Witness—baptist—Ordinance No. 3 of 1843—mode of swearing.*
D. C., Kurnegala, 17,230 312

Offence.

1.—*Taking forcible possession.*
P. C., Mallakam, 11,709 182

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Partnership.

1.—*Partnership—purchase by one partner of the other's share—claim for commission on the sale.*

D. C., Kandy, 43,833 212

Pawn.

1.—*Ordinance No.* 16 *of* 1865, *cl.* 65—*pawn.*

C. R., Colombo, $\frac{53,390}{51,508}$ 307

Police Court.

1.—*Ordinance No.* 11 *of* 1868, *cl.* 104—*binding over parties to keep the peace—cumulative punishment.*

The power given to police magistrates (under cl. 104 of Ordinance No. 11 of 1864) to bind over parties to keep the peace, is not cumulative

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and cannot be exercised in addition to the ordinary punishment it may award.

P. C., Negombo, 6,100 134

2.—*Sentence—previous commitment by a justice—power of police court to defer imprisonment till expiration of previous sentence.*

P. C., Jaffna, 8,008 145

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FISCAL.
PRACTICE.
STOLEN PROPERTY.
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Police Court—Practice.

1.—*Plaint—insufficiency—effect of quashing of conviction.*

The mere having in one's possession stolen property is no offence.

The quashing of a conviction is no bar to another plaint being preferred on the same complaint.

P. C., Galle, 45,206 5

2.—*Personal presence of complainant.*

The personal presence of complainant is essential at a trial before the police court.

P. C., Kandy, 56,358 6

3.—*Necessity of summons—Ordinance No.* 18 *of* 1861—*irregularities—procedure.*

The legislature intends proceedings in Police Courts to be by way of summons, except when the public peace and security require the prompt arrest of a wrong-doer, or where it is clearly shewn that a warrant is necessary in order to secure the appearance of the accused to stand his trial.

The object of a summons is to bring the party before the court with full and fair warning why he is brought there, and therefore, when it is clear that the party is already before the court with such a fair warning, a summons is unnecessary.

If the proceedings have been so irregular as to deprive the defendant of any substantial safeguard or privilege which the law intended to give him, a conviction based on such irregularities should be set aside.

But trifling irregularities which do not prejudice any substantial

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rights are not fatal, especially if they were not objected to at the time.

The object of the procedure of Police Courts is (1) to ensure accused parties a fair trial according to law, and (2) to prevent justice from being defeated by mere special pleading about unimportant technicalities..

P. C., Colombo, 67,670 21

4.—*Irregular proceedings—abandonment at the trial of the plaint laid—attempt to overawe the Supreme Court—contempt.*

It is irregular to abandon at the trial the plaint filed and to try a distinct charge without amending the original plaint.

To attempt to overawe the judgment of the Supreme Court is contempt of the grossest kind.

P. C., Panadura, 4,659 47

5.—*Irregularities—defective plaint.*

P. C., Galle, 410 52

6.—*Plaint—dismissal of, for absence of complainant—fresh complaint.*

The dismissal of a charge owing to the abseuce of the complainant is no bar to a fresh plaint being filed.

P. C., Jaffna, 4,326, ... 61

7.—*Necessity of summons &c.*

P. C., Jaffna, 4,716 77

8.—*Practice—absence of one of the accused—right of complainant to proceed or move for postponement.*

P. C., Jaffna, 7,270 142

9.—*Necessity of plaint.*

P. C., Gampola, 253 185

10.—*Jurisdiction—greater and lesser offence—power of Supreme Court to quash proceedings for excess of jurisdiction—under what circumstances such discretion exerciseable.*

P. C., Panadura, 7,096 193

11.—*Defendant's expenses—proctor's fees.*

P. C., Panwille, 7,622 208

12.—*Power of, to dismiss trivial cases.*

P. C., Jaffna, 14,019 282

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Police Force Ordinance.

1.—[*Ordinance No.* 16 *of* 1865, *cl.* 77]—*resisting police officer in execution of duty.*
P. C., Panwille, 4,842 146

2.—*Ordinance No.* 16 *of* 1865, *cl.* 70—*police officer—excess of authority—power to arrest or search—malice.*
P. C., Galle, 64,651 312

3.—*Ordinance No.* 16 *of* 1865, *cl.* 92—"*other matter of annoyance or obstruction.*"
P. C., Negombo, 14,058 313

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Practice.

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Prescription.

1.—*Acknowledgement.*
C. R., Galle, 3,000 155

2.—*Prescription—breach of contract.*
C. R., Kaigalle, 4,745 160

3.—*Coheirs—prescription—Roman Dutch law—Ordinance No.* 13 *of* 1822, *and* 8 *of* 1834.
D. C., Colombo, 33,239 191

4.—*Prescription—acknowledgement—authority of English cases.*
C. R., Kandy, 36,165 242

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MINOR.

Principal and Agent.

1.—*Coffee estate—supply of goods—liability of superintendent—under what circumstances.*
C. R., Gampola, 20,635 197

2.—*Foreign principal—liability of agent.*
C. R., Batticaloa, 17,000 295

3.—*Liability of estate owners for rice supplied on superintendent's*

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orders—credit to whom given—custom of owner—knowledge on the part of creditor—right of superintendent to pledge credit of owner.

D. C., Kandy, 40,446 178

4.—*Principal and agent—action on agreement for work and labour done—credit to whom given.*

D. C., Colombo, 44,460 310

Probate.

See APPEAL, 1.

Procedure (civil.)

1.—*Action on bond—amicable settlement and withdrawal of case from the roll—institution of second action for the same cause of action—breach of faith—contempt of court.*

Where the parties to a suit withdrew their case by a joint motion, "the plaintiff and defendant having made an amicable settlement regarding the claim therein," and thereafter the plaintiff brought a second action on the same cause of action, *held* that it was a breach of good faith and a contempt of court.

D. C., Galle, 19,591 6

2.—*Practice—resumption of case after a year and a day's laches.*

The power of the court to strike cases off the roll when no steps have been taken for a year and a day, is in full existence, and is not affected by the rule of court of 1842.

It is competent for the plaintiff to procure after due notice of motion the restoration of his cause by shewing tolerably fair excuse for his delay.

D. C., Negombo, 69 79

3.—*Practice—examination of party.*

C. R., Batticaloa, 13,000 176

4.—*Motion for postponement—insufficiency of consent of opposite party—adequate grounds for.*

D. C., Colombo, 42,477 212

5.—*Examination of party—admissions—nonsuit thereon—irregularity.*

D. C., Badulla, 17,113 215

6.—*Deposit in court of money admitted in pleadings—meaning of bringing money into court.*

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7.—*Action for damages—absence of prayer for interest—decree for damages only—power of District Court to award interest on motion made in that behalf.*

D. C., Colombo, 45,351 297

See DISTRICT COURT.
PROCTOR AND CLIENT.
PROVISIONAL JUDGMENT.

Procedure (criminal.)

1.—*Evidence of witnesses before institution of charge—admissions of prisoners to justice of the peace before institution of charge—Ordinance No. 9 of 1852, cls. 11 and 12—opportunity of prisoners to cross-examine, when duly charged.*

Reg. v. Silva 96

2.—*Prisoner under sentence—escape from gaol—application for habeas corpus—return to writ—amendment of return to writ—motion for passing of sentence—procedure.*

Where a prisoner under sentence had escaped from custody, and being retaken, was produced in court under a writ of *habeas corpus* and the return shewed no cause or authority whatever for the detention of the prisoner, *held* that an amendment of the return by setting out a commitment was not allowable, and that the prisoner was entitled to be discharged.

The motion that sentence be passed on him in pursuance of his trial and conviction, should be based on authentic evidence of the information, trial, verdict, sentence, escape and recapture.

Should the prisoner plead non-identity, a jury must be impanelled to try the issue.

In re *McSweeney* 111

3.—*Information—desertion—British ship—jurisdiction.*

P. C., Colombo, 97,300 225

Proctor and Client.

1.—*Trial of case—presence of defendant's proctor, waiver of trial notice.*

D. C., Kalutara, 20,686 210

2.—*Proctor—failure to conduct case—refund of fees.*

C. R., Colombo, 48,507 229

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Promissory Note.

1.—*Undertaking on pro-note to pay debt of the maker—stamp duty.*
C. R., Colombo, 29,447 127

2.—*Pro-note—place of payment—jurisdiction.*
D. C., Jaffna, 13,405 128

3.—*Pro-note—payment by maker to payee—right of maker to sue payee after paying innocent endorsee.*
C. R., Colombo, 31,969 133

4.—*Notice of dishonor—immediate indorsee—remote endorsee.*
D. C., Galle, 190 190

5.—*Principal and agent—partnership—custom of chetties—form of signature—liability thereon.*
D. C., Colombo, 42,686 209

6.—*Pro-note—alteration of date—consent of maker.*
D. C., Kandy, 42,917 218

7.—*Pro-note—notice of dishonor—dispensation thereof, from subsequent conduct of parties.*
D. C., Colombo, 49,302 334

8.—*Action by endorsee against endorser—arrangement between maker and endorser—knowledge and interest of endorsee in such arrangement—delay in presentment.*
D. C., Colombo, 41,276 339

Provincial Road Committee.

1.—*Ordinance No. 10 of* 1861—*Provincial Road Committee—action against for excessive assessment—absence of malice and mala fides.*
D. C., Kandy, 41,609 287

Provisional judgment.

1.—*Action by endorsee against maker of pro-note—proof of endorsement—principle of namptissement.*

Proof of endorsement is not necessary to entitle the endorsee of pro-note to obtain provisional judgment against the maker who has admitted his signature.

The principle of namptissement is not the establishment by plaintiff of a complete prima facie case. The principle is, where a defendant admits his signature to certain instruments or vouchers or entries which naturally import that he acknowledges a pecuniary obligation, he shall be

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liable to have this conditional judgment against him, the question of right to recover permanently being reserved for regular trial.

D. C., Colombo, 33,194 10

2.—*Motion for—default of defendant—appearance by counsel—denial of signature by counsel.*

On a motion for provisional judgment, the default of defendant's appearance does not dispense with plaintiff proving the signature of the defendant.

The denial of defendant's signature by his counsel is denial by the defendant himself.

D. C., Kandy, 40,612 127

3.—*Motion for, without prayer in the libel—practice.*

D. C., Colombo, 41,276 339

Public Officer.

See SALARY.

Purchase and sale.

See SALE.

Queen's Advocate.

See CIVIL SERVICE.

Recognisance.

1.—*Ordinance No. 6 of 1855, cl. 11—recognisance—proceedings thereunder—civil or criminal—practice—necessity of stamps—recovery of costs on behalf of the crown.*

D. C., Kurnegala, 17,335 262

Resistance.

1.—*Order of court—its execution by police officer—resistance.*

P. C., Point Pedro, 20,017 35

Salary.

1.—*Salary of public officer—seizure by fiscal—civil debt—authority of "taken for granted" law—power of Courts of Requests to attach the fiscal of a province beyond its own jurisdiction.*

C. R., Galle, 29,246 160

2.—*Salary of public servant—agreement to make it attachable—validity thereof.*

D. C., Colombo, 43,479 325

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Sale.

1.—*Auction sale—purchaser in default—power of resale—conditions of sale.*

Defendant bought, at an auction sale, the hull of a stranded vessel under certain conditions and, after paying 25 per cent of the purchase money, was in default of the balance. Plaintiff resold the hull at a loss and claimed the amount in question from the defendant.

Held that defendant was not liable either under the conditions read to him at the sale, or under the common law.

Martindale v. *Smith*, 1 Q. B. 389, followed.

D. C., Colombo, 34,430 53

2.—*Purchase and sale—stolen property—sale at open shop——law of Holland—market overt—innocent purchaser—law of Ceylon.*

In Holland, a *bona fide* purchaser of goods in the public market place on a regular market day, was not compellable to restore them to the true owner, if they turned out to have been stolen, without receiving compensation for what he paid for them.

But as in Ceylon there are no market places and stated market days, the privilege of a purchaser in market overt does not exist here.

The owner of stolen property has a right to recover it absolutely from even an innocent purchaser.

D. C, Kandy, 38,407 95

3.—*Warranty—latent defect—rescission of sale.*

C. R., Colombo, 29,876 136

4.—*Mortgagee and purchaser—negligence.*

D. C., Kandy, 43,570 218

5.—*Sale—misdescription of the thing sold—"about"—conditions of sale—claim for compensation for deficiency—fiscal and suitor—nature of the action.*

D. C., Kandy, 44,095 244

6.—*Purchase from executor—order of court—entail under last will—laches.*

D. C., Matara, 19,100 283

7.—*Sale of cinnamon crop—agreement for—"interest in land"—Ordinance No. 7 of* 1840*—damages—measure of—knowledge of defendant.*

D. C., Colombo, 45,351 284

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8.—*Sale of land—conditions of sale—misdescription—puffs—liability of vendor—duty of vendee.*
D. C., Kandy, 44,750 289

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TREES.

Schedule.

1.—*Ordinance No.* 1 *of* 1842, *cl.* 3—*Udeyar's schedule.*
P. C., Chavakachcheri, 5,331 135

Sequestration.

1.—*Writ of sequestration—motion to recall—trial of main issue in the interlocutory proceeding—practice.*

If the plaintiff's affidavit of the cause of action is on the face of it satisfactory, and if there is also no objection apparent on the face of the libel to the plaintiff's right to recover, the defendant cannot, on a motion to cancel the writ, except in very extreme and exceptional cases, anticipate the trial of the merits of the case and go into the existence of the cause of action.

Necessity of taking sufficient security and of the court satisfying itself that the defendant is really alienating his property.
D. C., Jaffna, 13,726 108

2.—*Sequestration—practice—R. & O. sec.* 15 *p.* 65—" *his own statement*"—*agent's statement.*
D. C., Colombo, 36,919 120

Servitude.

1.—*Division of tenements—implied grant of easement—its nature and extent.*
C. R., Kurunagala, 466 182

2.—*Neighbouring land owners—overhanging tree—tree owner and land owner—prescription.*
C. R., Colombo, 39,971 234

Shipping.

1.—*Charter party—obligation to load after discharging &c.*
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2.—*Consignee and captain—liability of captain for injury to cargo—contributory negligence of consignee.*
D. C., Colombo, 38,059 181

3.—*Consignee and ship owner—loss of goods over ship's side—ordinary precautions—custom of the port—bill of lading.*
D. C., Colombo, 38,573 220

4.—*Master and consignee—freight—abatement of—loss over ship's side.*
D. C., Colombo, 44,739 232

5.—*Damage to cargo—improper stowage—negligence of master.*
D. C., Colombo, 45,999 293

Slander.

1.—*Verbal slander—reiteration in pleadings—conduct of case by counsel—failure of proof—damages.*
D. C., Batticaloa, 14,265 189

See DEFAMATION.

Stellionatus.

See FALSE PRETENCES.

Stolen property.

1.—*Guilty receipt of stolen property—plaint.*
A plaint and conviction for "having property in their possession, knowing it to be stolen," is bad
P. C., Trincomalee 17,074 16

Succession.

1.—*Intestacy—law of North Holland.*
C. R., Panadura, 8,201 279

See WILL.

Theft.

1.—*Difference between English and Roman Dutch law.*
D. C., Galle, 9,515 5

2.—*Attempt to steal—obtaining goods under false pretences.*
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3.—*Theft by carter—jurisdiction of Police Court—fraud—attempt to commit—criminal intent—law of Ceylon—stellionatus—falsitas.*

Theft by carters of the property entrusted them, being a serious offence, is beyond the jurisdiction of Police Courts.

Semble that a carter was guilty of fraud, who short delivered to the extent of three bushels of coffee and proposed to the storekeeper of the complainant to share with him the value of the missing coffee and offered at the same time eight shillings in money as a bribe, if he would give a receipt in full.

Per CREASY, C. J.,—Although the mere intent to commit an offence is not criminally punishable if merely expressed in words, gestures or otherwise, without further proceeding to the crime to which it points, yet if the intent is accompanied by any act which serves as a proximate step and attempt towards the accomplishment of the crime, that act, though in itself not indictable, will become so when coupled with the criminal intent which prompted it.

Reg. v. *Arnasalem Kangani*, (p. 71 of these reports) approved.

P. C., Colombo, 74,294 89

4.—*Robbery—theft—appeal*—[*Ordinance No.* 11 *of* 1868, *cl.* 108]—"*staying the execution.*"

P. C., Kandy, 61,135 147

5.—*Land owner and cultivator—crop.*

P. C. Chavakachcheri, 7,790 195

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STELLIONATUS.

Thesavalamai.

1.—*Contract for the future sale of land—necessity of publication and schedule—right of pre-emptionary third parties.*

By the *thesavalami*, publication and schedule are not necessary in order to make a contract for the future sale of land valid as between the contracting parties.

D. C., Jaffna, 12,869 93

2.—*Devolution of property—widower wishing to marry—daughter of the first bed.*

If a man having a daughter wishes to marry again, the grandmother or nearest relation of that daughter takes charge of her, the father at the same time handing over the whole of the property brought in marriage by his deceased wife and the half of the property acquired during his first marriage.

C. R., Chavakachcheri, 11,628 107

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3.—*Majority—females—marriage.*

A young woman attains majority at 13 and she may then marry without the consent of her parents.

D. C., Jaffna, 12,739 128

4.—*Right of wife to sue her husband.*

C. R., Jaffna, 32,178 158

Toll Ordinance.

1.—*Practice—plaint—insufficiency of statement of time—prejudice of substantial rights.*

A variance between the day laid and day proved is not necessarily fatal.

But, in a charge under the Toll Ordinance, it is material to state the day, not merely the month, in which the offence was committed, more especially as certain prosecutions are limited to a month from the commission of the offence.

Procedure where amendment allowed.

P. C., Point Pedro, 19,690 4

2.—*No.* 22 *of* 1861, *cls.* 4 *and* 9 *and schedule A*—[*No.* 14 *of* 1867, *cls.* 4 *and* 8 *and schedule B*]—*purpose of schedule—" on the Kandy road at the* 10*th mile post"—necessity for proclamation.*

A schedule is in the nature of an inventory of names or articles which are be dealt with as required by the body of the document, but which are written at the end of it for convenience.

The words, occurring in schedule A of Ordinance No. 22 of 1861, " on the Kandy road at the 10th mile post," cannot, according to the ordinary rules of interpretation, be construed to amount to a deliberate and sufficient enactment as to place of tolling, especialy as that subject is separately dealt with in the body of the statute, viz. cl. 9.

Without a proclamation as required by that clause, it is unlawful to levy toll on the Kandy road at the 10th mile post.

P. C., Colombo, 68,141 13

3.—*Toll—cart carrying passengers—Ordinance No.* 22 *of* 1861, *cl.* 4 [*No.* 14 *of* 1867, *cl.* 4.]

A cart drawn by two bullocks, while carrying passengers, is liable to toll as a vehicle for passengers.

P. C., Colombo, 70,275 36

4.—*Evading payment of toll.*

P. C., Bal. Modera, 28,118 144

5.—*Toll—carts carrying manure.*

P. C., Colombo, 3,756 324

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Tortious legal proceedings.

1.—*Proof of malice—sufficiency of averment to injure.*
D. C., Kalutara, 19,636 191

Trees.

1.—*Sale of growing trees—verbal agreement—Ordinance No. 7 of* 1840.
C. R., Colombo, 29,279 158

2.—*Tree standing on land—sale.*
C. R., Panadura, 226 226

3.—*Overhanging tree—right to cut down overhanging portion.*
C. R., Galle, 35,508 307

Trespass.

1.—*Cattle damage feasant—damages.*

In an action for tort, such as for cattle trespass, the plaintiff who proves that an injury has been done to him is entitled to a verdict, though he cannot prove that the injury has cost him a farthing.

If there are no circumstances of aggravation, nominal damages should be given, but if the wrongful act was done maliciously, insolently or with deliberate wilfulness, exemplary damages may and ought to be given, though no pecuniary loss had been caused.

C. R., Kandy, 30,033 18

2.—*Cattle trespass—damages - evidence—remedy under Ordinance—common law remedy.*

In an action for damages against one of several owners of cattle which had trespassed, it is not necessary to prove special damage by each individual cattle. It is sufficient to prove the aggregate damages caused by the trespass of the whole herd, and the mode of computing the amount of damages done by each head of cattle is to divide the aggregate amount of the damages by the number of the trespassing cattle.

When a plaintiff has elected to pursue the common law remedy, he is bound only to supply the common law proof.

C. R., Galle, 25,177 62

Use and occupation.

1.—*Use and occupation—parol lease—part performance—Ordinance No.* 7 *of* 1840, *cl.* 2—*evidence.*

A landowner in Ceylon can recover for use and occupation without a notarial instrument, if there has been actual use and occupation.

Qu.? whether every part performance takes the case out of the statute of frauds.

C. R., Kalutara, 17,112 83

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2.—*Use and occupation—rent—damages.*
C. R., Kalpitiya, 20,144 124

Vagrants Ordinance.

1.—*Ordinance No. 4 of 1841, cl. 4—act of vagrancy—adjudication.*
P. C., Negombo, 5830 134

2.—*Disorderly behaviour—abusive language—riot.*
P. C., Mulletivoe, 5,636 184

See MAINTENANCE.

Will.

1.—*Last will—intention of testatrix—undue influence—memorandum of instructions—interest of executor—his active part in directing preparation of will—his son, a legatee—insanity of testatrix—evidence of medical attendants—necessity of scrutiny into such evidence—caution against setting aside a will executed regularly and of free will—illusions and delusions.*
In re *De Raymond*, D. C., Colombo, 2,781 164

2.—*Last will in several sheets—signature and attestation thereof—presumption of the genuineness of the whole will, where last sheet only signed—such presumption rebuttable—desirability of calling all subscribing witnesses to a disputed will—clausulae inconsuetae.*
D. C., Kandy, 45,254 325

Witnesses.

1.—*Witnesses before Police Courts—their expenses by whom payable—English law—Civil law—what law applicable to Ceylon—Ordinance No. 3 of 1846, sec. 5.*

The English law gives a witness in all civil cases a right to his expenses (the cost of coming to the court, remaining there and returning thence) and he may refuse to give his evidence until they have been paid.

But in criminal cases, as a general rule, it considers it to be the public duty of every citizen to attend and give evidence, and the party at whose instance he is subpœnaed is not bound to remunerate him.

Though the Ordinance No. 3 of 1846, sec. 5, specially declares that English rules regulating the expenses of witnesses are not introduced by that Ordinance into Ceylon, still the English law, and not the Civil law, has to be followed on that subject.

C. R., Negombo, 5,159 57

Writ of execution.

See ARREST.
CONCURRENCE.
SALARY.

1863.

15th January.

Present:—Creasy, C. J., and Thomson, J.

D. C., Kandy, No. 36,604. } *Thoongappa Chetty* v. *Tikiri.*

On appeal preferred by defendant, *Dias* appeared for him.

Action on a bond—plea of *non numeratæ pecuniæ*—presumption and disproof of consideration.

The following judgment of the Supreme Court sets out the facts of the case :—

In this case, the plaintiff sued on a money bond for £40 The defendants admitted the execution of the bond, but pleaded, except as to £17, want of consideration, and as to the £17 payment.

The bond recited that £40 had been borrowed and received by the defendant, and it contained the usual clause renouncing the exception *non numeratæ pecuniæ*. The subsequent part of the instrument mortgaged certain lands, but it was only as a money bond that it was sued on in this action.

At the trial the defendant's counsel offered oral evidence to prove the want of consideration, stating that he had no written evidence to prove it.

The learned Judge rejected the parol evidence so tendered. The Supreme Court considers the rejection erroneous.

The law as to presumption and disproof of consideration having been given for a bond in this Island, is precisely the same as the law as to presumption and disproof of consideration having been given for a promissory note or a bill of exchange. Consideration is in the first instance presumed, or (to adopt the language used by this Court in 8,787, Chilaw, reported in *Beling, p.* 317,) the instrument is itself *primâ facie* evidence, that it was given for consideration only to be rebutted by satisfactory evidence to the contrary. But that evidence may be either verbal or written. The right to disprove consideration for a bond cannot be taken away, nor can it be limited as to the nature of the rebutting evidence by a recital of receipt of the money, any more than the

1863. March, 24.

right to disprove the consideration for a bill or note is taken away or limited by the insertion of the common words "value received."

The Supreme Court quite agree with the learned Judge as to the caution with which witnesses who come to swear away consideration are to be regarded, but this applies not to the admissibility, but to the value, of their testimony.

The bond in this case was not under seal, but even if it had been, this defence would still have been maintainable, and parol evidence in support of it would have been admissible.

The whole law on the subject will be found very fully stated in D. C., Galle, 14,502 decided by the Supreme Court on the 18th day of June, 1851.

24th March.

Present:—Temple, J.

P. C. Badulla, No. 7,354. } *David Appu* v. *Brown.*

Fiscal and suitor—resistance to process server—Ordinance No. 1 of 1839, cl. 10 [Ordinance No. 4 of 1867, cl. 23]—unauthorised agent.

Complainant, a process server, charged defendant with resisting him in the discharge of his duties as a Fiscal's officer.

The circumstances of the alleged resistance are sufficiently indicated in the following judgment of the Supreme Court, which affirmed the order of acquittal, in these terms :—

This is a charge under the 10th clause of the Ordinance No. 1 of 1839, for obstructing a Fiscal's officer in the discharge of his duties.

It appears that the complainant who is a Fiscal's peon, proceeded to the estate of the accused to serve some summonses on coolies employed on the estate, and as they were unknown to him, he was accompanied by a cangany to point them out, but as the kangani's name was not mentioned in the summons the accused refused to permit him to enter the estate, which is the obstruction complained of.

The Supreme Court does not consider that the kangani, not having been duly authorized to accompany the Fiscal's peon, can in any way be considered as a Fiscal's officer, and cannot therefore be one of the officers contemplated by the 10th clause of the Ordinance.

The Supreme Court is further of opinion that a Fiscal's peon has no right to take any person on to an estate, unless that person

has been duly authorized to point out the parties on whom process is to be served. 1863. May, 12.

12*th May*.

Present:—Creasy, C. J.

P. C., Ratnapura, No. 1,437. *Stewart* v. *Wattohamy*.

Offence—Disturbance tending to a breach of the peace—beating tom-tom—devil dance.

The following is the judgment of the Supreme Court :—

It is necessary in this case, first, to see whether the complaint as laid discloses any legal offence. This complaint is as follows,—

That "the defendants did on the night of the 22nd March, 1863, at "Ratnapura, near the public road, create a disturbance tending to "a breach of the peace by beating tom-tom, and behaving in a "disorderly manner, and yelling throughout the whole night."

I think that the cases reported in *Lorenz's Reports, pp*. 17 and 122, show that the acts charged against the defendants here amount to a criminal misdemeanour, and also constitute an offence cognizable by a Police Court.

Next as to the sufficiency of the evidence, that in my opinion is ample ; it was proved that the defendants, made such a disturbance throughout the night as to break the peace of the whole neighbourhood, and put the lives of some sick people who lived near in actual danger. It was proved also that they did this in spite of warnings aud request to abstain from such conduct.

Next as to the excuse that the offensive proceedings complained of were a "*devil dance*" and part of the defendants' customary religious ceremonies. The members of all religions are under the equal protection of the laws of this Island. But no one can be permitted in our Courts to use his creed or ritual as a justification for acts which in themselves amount to a criminal offence. If this were allowed, we might have a party of Thugs come and murder people here with impunity under the plea that their religion enjoined them to do so.

Affirmed.

1863.
May, 19.
—

19th *May.*

Present:—CREASY, C. J.

P. C., Point Pedro, No. 19,690. } *Narayanan* v. *Candappen.*

Practice—plaint—insufficiency of statement of time—prejudice of substantial rights.

The conviction and sentence of the court below were set aside in these terms :—

In this case the plaint was as follows :—

" That the defendant did in the month of March last, omit to suspend in a conspicuous place in the Toll station at Tunalle, a copy of the 4th section of the Toll Ordinance, and the notice setting forth the name or names of person or persons appointed to collect the toll in breach of the 13th and 15th clauses of Ordinance No. 22 of 1861."

An objection as to the insufficiency of the statement of time in the complaint was made at the hearing, and ought to have been attended to. The Supreme Court thinks that the substantial rights of the defendant upon the merits " were prejudiced in this case" when the plaint vaguely informed him that he was to meet a charge of having at some time or other in the month of March, neglected to obey a specified provision of the Toll's Ordinance. The defendant complained, at the hearing, of the difficulty of coming prepared with evidence to disprove an accusation so loosely framed, and his complaint was reasonable.

The plaint ought to state a definite day. The Supreme Court does not wish to encourage technical objections in Police Court cases, nor is it to be supposed that a variance between the day laid and the day proved is necessarily fatal to the proceedings. But when ever there is reason to believe that the defendant has been misled by a wrong day being stated, an adjournment ought to be granted to him in order to enable him to meet the charge.

In the present case no day at all was named, and the Police Magistrate seems to have thought it open to the prosecution to give general evidence about what had happened at any time and at all times during the month of March.

The proper course for the Magistrate was, when the objection was taken as to the statement of time in the plaint, to amend the plaint under the Police Ordinance, Schedule A. v. 24, by inserting a specific day, and to postpone the hearing when required by the defendant, so as to give him reasonable time to prepare his defence.

The omission in the plaint of the day on which the offence was committed, is also material in this case for a special reason. By the 20th section of the Toll Ordinance prosecutions are limited to a month from the commission of the offence. Here the plaint was

entered on the 9th of April. A mere statement that the offence was committed sometime in March did not show with certainty that the offence was punishable by law when the proceedings were taken. The Supreme Court also recommends Police Magistrates to take care to base their judgments on the legal evidence given before them, and not on their own private knowledge as avowedly was done in the present instance. Conviction set aside.

1863. June, 9.

5th June.

Present :—Creasy, C. J., Temple, J., and Thomson, J.

D. C., Galle, No. 9,515. } *Queen* v. *Mathes*, et al.

Theft—difference between English and Roman Dutch law.

The judgment of the court was set aside and the case remanded for re-hearing, as follows :—

In this case the court below pronounced an acquittal on the ground that there was no proof of an original asportation or wrongful taking. According to English Law, an asportation must be proved to support a charge of theft ; but not according to the law of Ceylon. In Ceylon it is only necessary to prove a wrongful conversion of property.

9th June.

Present :—Creasy C. J., Temple, J., and Thomson. J.

P. C., Galle, No. 45,206. } *Keegel* v. *Madomahamy.*

Plaint—insufficiency—effect of quashing of conviction.

The conviction in this case was quashed in these terms :—

The prisoner is not found guilty of theft, nor would the evidence have warranted such a finding. The part of the plaint on which she is convicted, charges her with "having in her possession a handkerchief and towel, the property of the complainant." The Supreme Court has frequently pointed out that such a charge discloses no legal offence, and convictions for such charges have been repeatedly set aside. (*Lorenz's Reports, p.* 93.) The charge here (as in that case) ought to have stated that the prisoner *received* stolen property knowing it to have been stolen.

As the evidence shows the present offence to have been a very bad one, as there is abundant corroboration of the accomplice, and as the appellant by being out on bail has suffered no punishment under the charge as already preferred, the Supreme Court think it right to point out that neither the present conviction nor the quashing of it is any bar to the preferring a fresh and properly framed complaint against the accused.

1863.
June, 18.

16th *June.*

Present :—Creasy, C. J., Temple, J., and Thomson, J.

P. C., Kandy, No. 56,358. *Braybrooke* v. *Punchirale.*

Practice—personal presence of complainant.

Complainant who was acting as Fiscal charged the defendant with having failed to exercise proper vigilance over the prisoners committed to his charge, and thereby allowed a convict to escape from his custody, in breach of &c.

On the trial day, defendant moved to be discharged, as complainant did not appear in person, but the magistrate over-ruled the motion, on the ground that the Deputy Fiscal who was present in court might represent the Fiscal.

On appeal against a conviction (after evidence taken and considered), the Supreme Court, set it aside in these terms :—

The complainant was not present at the trial and the defendant applied to have the case dismissed under the Police Rules and Ordinance, Schedule A., section 13. The Police Court Ordinance clause 16 is a strong authority to show the necessity of personal presence of the complainant. No inconvenience need be caused by enforcing this, as clause 1 of Schedule A of the Rules, enables any person to be the complainant, and there certainly was no occasion to use Mr. Braybrooke's name on the present occasion.

18th *June..*

Present :—Creasy, C. J., Temple, J., and Thomson, J.

D. C., Galle, No. 19,591. *Danno* v. *Siman* et al.

Action on bond—amicable settlement and withdrawal of case from the roll—institution of second action for the same cause of action—breach of good faith—contempt of Court.

Lorenz for defendant (appellant).

Dias for plaintiff (respondent.)

The facts of this case appear in the following judgment of the Supreme Court.

This is a second action on a bond, on which a former action had been brought by the same plaintiff against the same defendant. At the close of the record in the first case, we find an entry of a motion signed by both parties to withdraw the case, "the plaintiff and defendant having made an amicable settlement regarding the claim therein," and we find that the Judge thereon ordered the withdrawal of the case.

To bring a second action under such circumstances for precisely the same cause of action was in our opinion a breach of good faith and a contempt of Court.

Plaintiff's case is dismissed.

D. C., Negombo, No. 69. — *Fernando* et al v. *Silva* et al. — 1863. June, 18.

Practice—resumption of case after a year and a day's laches.

This case had been "struck off" the roll on 13th August 1862, as no proceedings were had for over a year and a day.

On the 9th January, 1863, plaintiffs moved "to be allowed to resume the case, and that a summons do issue to defendants to appear and answer to the libel filed against them."

The motion was disallowed, the District Judge recommending a re-institution of the suit.

On appeal, the Supreme Court dismissed the appeal with liberty to the plaintiffs to apply to the District Court in the manner indicated in the following judgment :—

The Supreme Court thinks that the District Judge was right in refusing the motion that a summons should issue to defendants requiring them to appear and answer the libel ; but this Court does not agree with that portion of the judgment which seems to lay down that it is necessary for a plaintiff to institute a fresh action if his original case has been struck off on account of a year and a day's laches. The Supreme Court thinks it desirable on account of doubts that have been expressed on the subject, to record its opinion that the power of the Court to strike cases off the roll when no steps have been taken for a year and a day is in full existence, and is not affected by the Rule of Court of 1842. The nature of this power and the mode in which it should be exercised, viz., by an order of the Judge, are fully shown in the *Isagoge* of *Grotius, p.* 301, *note,* and in *Groenewegen de Judiciis, p.* 74. The same authorities show that it is competent for the party to procure the restoration of his cause by showing tolerably fair excuse for his delay. This ought not, however, to be a mere motion of course or an *ex parte* proceeding. Notice of the intended application should be given, or else only a rule to show cause should in the first instance be granted.

C. R., Kandy, No. 30,619. — *Aroken Kankani* v. *Cooper* et al.

Cattle damage-feasant—Ordinance No. 2, of 1835—remedy by distress.

Plaintiff sought to recover £10 as damages sustained *inter alia* by reason of defendants unlawfully detaining certain cart bullocks belonging to plaintiff.

The defendants pleaded that the bullocks in question were seized while trespassing on their coffee estate, and that as plaintiff refused to pay the damages claimed, the bullocks were detained.

1863. June 30. — It appeared in evidence that the defendants did not cause the damages to be assessed in manner pointed out by clauses 3 and 6 of Ordinance No. 2 of 1835. The commissioner found that defendants had no right to demand the sum they did, and that the detention of the cattle was illegal. He awarded damages at the rate of one shilling per head per day for the cattle detained.

On appeal, *Lorenz* for appellant, *Ferdinands* for respondent.

The Supreme Court remanded the case to the court below in these terms :—

The case is sent back to the Court below for the Commissioner to find whether or not the 5s. was paid as asserted, and whether the 5*s*. if paid, was a fair remuneration for the damage done.

The first defendant would not be concluded by the opinion of his cangany on that point. On the other hand, the defendant had no right to detain the cattle until something by way of fine was paid over and above the amount of damage.

This case has been considered solely with reference to the Ordinance No. 2 of 1835, and it is clear that the defendant had not complied with the provisions of that Ordinance, so as to justify under it. But the remedy given by that Ordinance to holders of land is cumulative, and does not take away the old remedy by distress, when cattle are taken damage-feasant (see case in *Austin's reports, p.* 102. *Nell's reports, p.* 95. *The Amberly R. Company* v. *Midland R. Company, L. J.* 23, *Q. B.* 16, and see *Van Leeuwen, p.* 494, which shows that a right to tie and detain cattle found trespassing existed under the Roman Dutch Law analogous to the English Law of distress damage-feasant.

In this case the taking of the cattle damage-feasant is admitted. The question is, did the defendant detain them after sufficient compensation for the damage had been paid and tendered ?

3rd July.

Present :—Creasy, C. J., Temple, J., and Thomson, J.

C. R., Matara, No. 14,938. } *Louis* v. *Bale Appu.*

The following is the judgment of the Supreme Court, affirming the decision of the court below :—

Action by lessee against prior-lessee for wasteful damage.

This was an action brought by a lessee against a prior lessee for wasteful damage to the estate committed by the prior lessee whilst that prior lessee's lease was still current, and before the term of the plaintiff's lease had commenced, but after the plaintiff's lease (the

term of which was to commence *in futuro*) had been executed. The damage to the estate was such as to prejudice and injure the plaintiff when he came into possession. 1863 July, 8. —

It was objected that the plaintiff could not maintain such an action, and a decision of this court 19,121, D. C., Matara, was referred to. On examination it appears, that in that case the injury was committed before the second lessee's lease was executed, a difference which makes that decision no authority in the case now before us. Several English cases were cited to show that the second lessee could not bring trespass for such an injury, but those cases all depend on the peculiar doctrines of the English Law as to actions, and on the principles of feudalism which are so largely embodied in the English Law of real property. We try the case by a different standard, and it seems to us that the defendant is under an obligation arising out of delict to make compensation to the plaintiff for the damage, which the defendant's injury has caused him, that injury having been committed at a time when the plaintiff had acquired a lawful interest in the property.

3rd July.

Present :—Creasy, C. J., Temple, J., and Thomson, J.

P. C., Kandy, No. 56,486. } *Smith* v. *Muttoe.*

The following judgment of the Magistrate sets out the facts of the case :— Master and servant—Labour Ordinance—estate cooly.

In this case the defendant is charged with leaving the complainant's service on the 14th November, 1862, without notice in breach of clause 7 of Ordinance No. 5 of 1841. The defence is that the defendant, as an estate coolie, was only a daily labourer, and therefore that no notice was necessary.

Hitherto estate coolies have been invariably regarded in this colony as monthly servants, and have been so dealt with by the local Courts. But it having been recently mooted whether they are deemed in law daily labourers, or monthly servants, the defendant takes advantage of the doubt thus thrown on established custom, and renders it necessary for the Court to determine the exact nature of the agreement made by employers of agricultural labour with the labourers ordinarily known as estate coolies, and the applicability of the Servant's Ordinance to the due enforcement, on both sides, of the terms of such agreement.

The argument adduced in favor of the estate coolie being a day labourer is, that he does not receive monthly wages, but is paid

1863. July, 3. — at a certain rate for every day he works, and that he receives no pay for Sundays. On this ground it is urged that the work for which he is engaged is of a kind "usually performed by the day" and therefore that the case falls within the exceptions contained in clause 2 of Ordinance No. 5 of 1841.

Is there no fallacy in this argument? What are monthly wages? What is meant in the Ordinance by work "usually performed by the day?"

There would appear to be a grave fallacy underlying the argument of this case, namely the assumption that an agreement to pay a certain rate of wages per mensem is essential to a contract for service by the month, and as if to bolster up this fallacy the expression "*monthly wages*" is invariably used in discussing the question, instead of the more intelligible and less ambiguous term used in the Ordinance, namely, wages "payable monthly."

It is somewhat difficult to determine the precise meaning to be attached to the words "work usually performed by the day," but taking those words in connection with those immediately following, namely, "by the job or by the journey," the most reasonable interpretation would be that all agreements for works usually completed in a day (as also those for the execution of a job or for the performance of a journey,) that is, all agreements for the performance of a service to be completed in some definite period less than a month, are excluded from the operation of the law which ordinarily presumes a monthly contract. Consequently work of a continuous nature, such as estate labour, cannot be regarded as "work usually performed by the day."

And that agricultural labourers do not fall within this exception, is proved by the terms of Ordinance No. 13 of 1858.

In favor of the agreement between estate owners and their coolies being a monthly contract, and apart from the consideration that all contracts except those falling within the exceptions referred to above are monthly contracts, there is the general *consensus* of both employers and employed throughout the Island; and in this particular case, there is satisfactory proof of a monthly contract.

It is true that the wages of the coolie are only reckoned according to the number of days he works, but these wages are payable monthly.

Nor is the coolie an ordinary day labourer who comes to-day and goes to-morrow. He is a resident servant of the estate, housed on the estate, supplied with food in advance, and at moderate prices, frequently far below the market rates, and supported at the expense of the estate in hospital when sick. In return for these benefits the coolie feels bound to give notice of his intention to leave his employer. And the complainant states that such notice is invaria-

bly given by the coolie unless he absconds to evade the payment of his debts to his kangany. 1863. July, 3.

The conduct of the planters towards the coolies shews that on their part, the contract is not regarded as a daily one ; the agreement by the coolies to have their wages paid monthly and their custom of giving notice of their intention to leave, are a proof that they regard the agreement as a monthly contract.

There is a decision of the Supreme Court in appeal affirming a judgment of the Police Court of Nawalapetia (No. 5,140), which is exactly in point. The only information to be obtained from the record in that case is that the defendants who were estate coolies, charged with leaving service without notice, were convicted, and sentenced to one month's imprisonment ; the Magistrate over-ruling the objection taken by the defendant's Proctor, that under a provision of the 2nd clause of the Servants' Ordinance, the accused could not be tried as monthly servants.

On referring, in the absence of any authentic record, to the public prints of the day (*Examiner*, 18th, 1857) it appear that the question of the period of engagement was fully argued by counsel before the Supreme Court (Rowe, C. J., and Temple, J.) and that it was distinctly ruled that estate coolies are monthly servants.

The then Chief Justice in giving judgment said "whatever " may be the *rate of wages* we must look to the *work* and *work* " *alone* to determine the nature of the contract, and if the work " is not such as is usually performed by the day, by the job or by " the journey, then it is a monthly contract."

The Supreme Court also ruled that estate labour is not work usually performed by the day,—" that it has not even the semblance " of *daily* labour."

The defendant is found guilty, but considering the length of time which has elapsed since the commission of the offence, a severe punishment is not called for.

The defendant is sentenced to forfeit all wages due to him on the 14th November, 1862, not exceeding the wages of one month, and to be imprisoned at hard labour for one day.

The defendant appealed against this conviction.

Lorenz for appellant, *Dias* for respondent.

The Supreme Court affirmed the conviction in these terms :—

We have not the slightest doubt that this cooly was a monthly servant, and as such amenable to the provisions of the Ordinance, No. 5 of 1841, cl. 7. We agree with the reasons given by the Police Magistrate in his careful and able judgment. Our opinion is strongly confirmed by the decision of this Court in the

1863. July, 3. — Navellapittia case to which he refers, and also by the numerous English authorities on the presumption of length of hiring.

The effect of the Ordinance, No. 5 of 1841 (as has been fairly stated at the bar) is to raise a general presumption that contracts of hiring here are monthly hiring, analogous to the general presumption in England that they are yearly hiring ; in other words, unless there are special circumstancos that point the other way, the servant is to be taken to be hired by the month. There are numerous English decisions (many of which have been quoted to-day for the appellant) that show that where the reservation of daily or weekly wages is the only proved fact, from which the question of the contract can be collected, the hiring will not be held to have been for a longer period than for the day or the week as the case may be. But there are authorities equally numerous and strong to shew that where there are other terms stipulated for by the parties inconsistent with the notion of a daily or weekly hiring, or where there is anything in the nature of the employment, or any paiticular custom or usage leading necessarily to the conclusion that the contract was for a longer period, then the supposition from the rate of payment of daily or weekly hiring is rebutted. The case is remitted to the general presumption of Law, which (in this Island) implies a hiring for a month, as in Engiand it implies hiring for a year. The authorities may be found collected in *Addison on Contracts, vol.* 1 *p.* 491, or in *Dickinson's Quarter Sessions p.* 766, or any other book on Settlement Law. Now besides the numerous facts proved in this case and commented on by the Police Magistrate, which show that the customary position and treatment of this estate cooly were incompatible with the theory that he was hired by the day only ; we will take the stipulations mentioned by the employer as made between him and the cooly. He says that he engaged the cooly at a daily rate of wages for every working day, *the wages being payable monthly.* It seems absurd to look upon such a servant as a daily servant. If so, he might be discharged at the end of his first day's work, with at most a day's notice, and yet have to wait till the end of the month before he got his payment.

We think it clear he was a monthly servant, and that the stipulation as to payment in respect of each day merely affected the rate of wages at which he was to be paid, and not the term for which he was hired.

P. C., Colombo, No. 68,141. } *Pieris* v. *Nonis.* 1863. July, 3.

Toll Ordinance.

The defendant in this case was charged with illegally demanding and receiving a sum of one shilling as toll at the bridge of boats on the 11th March 1863, payment of which had been already made at the toll station at the tenth mile stone on the Kandy road, for a loaded cart, while passing on the same day, in breach of cl. 15 of Ordinance No. 22 of 1861.

On appeal against a conviction, the Court (*Thomson, J.* dissenting) upheld it.

Thomson, J.,—I regret to differ from my learned brethern in this matter, but I am clearly of opinion that the Ordinance creates a *new* and *separate toll* at the *tenth mile post,* and that the payment of that toll does not clear the toll collectable at the bridge of boats ; I am also of opinion that according to the Ordinance in reference to this particular toll, a Proclamation appointing a place for collection, is not primarily necessary, that being appointed by the Ordinance itself, leaving it to the Government to appoint, if necessary, any other place or places, within a reasonable distance for the collection of the toll. I do not think that the fact of the toll for the bridge being still collectable at or near the 10th mile post, alters this state of things, thinking that a new and separate toll is leviable at the 10th mile post as well as the tax in respect of the bridge ; in fact that one toll for the bridge may be levied at the bridge or at the 10th mile post and that another toll may be leviable at the 10th mile in respect of the up-keep of the Kandy road, the other toll being for the up-keep of the bridge of boats.

Creasy, C. J.,—I cannot feel satisfied that the judgment in this case is wrong, though I do not adopt all the reasoning of the Police Magistrate in support of the decision.

I quite appreciate the distinction taken by the Counsel for the appellant between the principle on which toll was levied at the bridge of boats, and at the 10th mile station on the Kandy road, under the old Ordinance, and the principle on which it was intended to take toll under the new Ordinance.

Formerly there was no toll for the user of the road ; the toll was levied in respect of the user of the bridge only. It was on toll payable at one out of two appointed places ; but payable once only. Now it is stated, it is intended to have two tolls, one for the use of the bridge, payable at the bridge, and another distinct toll for the use of the road payable at the *tenth* mile stone. It may have been intended to effect this by enactment, and by proclamation in pursuance of the enactment ; but we have to see whether it has been really done.

1863. July, 3. — The 4th clause of the new Ordinance enacts substantially that the rates of toll for the use of certain roads, bridges, ferries and canals mentioned in its schedules, shall be fixed by proclamation by the Governor. I am giving what I think is the natural meaning of the clauses, and the way in which they would be understood by any person who read them without having any preconceived theory about their object. I will speak of the schedules presently.

Now it is certain that a proclamation of 18th January 1862, has appeared in pursuance of the 4th clause, fixing the rates of toll, it is equally certain, that no proclamation has been issued under the 9th clause, fixing the places at which tolls shall be collected.

So far then as the clauses themselves of the new Ordinance go, and so far as the authorised action of the Executive by way of proclamation in furtherance of them has gone, there is nothing to justify the levying of toll at either the 10th mile stone or at the bridge of boats, in other words unless some authority beyond the 4th and 9th clauses themselves, and beyond the Proclamation of January, 1862, can be found, the levying of toll at those places is illegal; inasmuch as it is only lawful to levy toll at places appointed by the Governor, and neither of these places has been so appointed.

But it is argued in support of the claim to toll and of the claim to the second toll in this case, that no Proclamation was necessary in this respect under the 9th section, inasmuch as the Ordinance had by the Schedule to the 4th section appointed these places as stations for taking toll. Now let us pause and consider the natural purpose of a Schedule. It is like an inventory, a long list of names or articles which are to be dealt with as required by the body of the document, but which are written at the end of it for convenience. Now the natural and obvious purpose of the 4th clause being to authorize the Governor to fix the rates of toll payable in respect of the roads, bridges, &c., mentioned in the Schedule, we should naturally look to the Schedule to see what are the roads, bridges, &c., in respect of which the Governor is to fix the rates of tolls. It is not natural to look to the Schedule for the enactment of a nature distinct from the nature of the claim to which the Schedule is a mere adjunct especially if the new subject is expressly dealt within a separate part of the Ordinance itself. The 4th clause is a rate of toll clause, the 9th clause is a place of tolling clause. Why according to the common principles of the interpretation of statutes and other documents, are we to take the Schedule of the rate of toll clause as controlling or modifying the operation of the totally distinct place of tolling clause?

Now then let us read the very words of clause 4 and of its Schedule so far as those places. The clause is as follows :— 1863. July, 3.

" Tolls shall be levied in respect of the roads, bridges, ferries and canals specified in the Schedules A. B. C. and D. respectively to this Ordinance annexed at such rates as the Government may from time to time by Proclamation in the *Government Gazette* shall be pleased to appoint, provided that the same shall in no case exceed the rates hereinafter specified, that is to say.

The Schedule is as follows :—

A.
ROAD.
Western Province.
Bridge of Boats.

Now I think that an unbiassed reader of the Schedule who looked at it for its legitimate purpose, namely to see what are the bridges, &c., in respect of which the Governor is to fix rates of toll, might think the language of this schedule a little strange, but would find it sufficiently intelligible to answer its proper purpose and would know from it that the bridge of boats was a bridge, and the Kandy road is a road in respect of which the Governor might fix rates of toll. If any force were given to the words at the 10th mile stone in the Schedule, I should understand them as meaning that it was the Kandy road as far as the 10th mile stone in respect of which rates of toll were to be fixed. I cannot regard those words standing where they do as amounting to deliberate and sufficient enactment about place of tolling, especially when I find that subject separately dealt with by the *ninth* clause without any allusion to a recognition of the supposed fact of the subject being partly disposed of in another portion of the Ordinance. I have been considering this matter according to the ordinary rules for ascertaining the true meaning of the statutes and other documents from the contents of the instrument itself, but it is not to be forgotten that this is an Ordinance imposing a public burden and that it is therefore to be considered very strictly. It is rightly laid down in *Dwarris on Statutes*, p. 646, that " It is a well settled rule of law that every charge upon the subject must be imposed by clear unambiguous language. Acts of Parliament which impose a duty upon the public will be critically construed with reference to the particular language in which they are expressed ; when there is any ambiguity found, the construction must be in favor of the public, because it is a general rule that where the public are to be charged with a burden the intention of the legislature to impose that burden must be explicitly and distinctly shown." *Dwarris* cites many authorities (several of these being toll cases) in support of this proposition and many more might be added. Now I cannot bring myself to consider that the legislature

1863. July, 7. — has in this Ordinance "by clear and unambiguous language" appointed the 10th mile stone on the Kandy road as a place for taking toll, and I therefore cannot join in reversing the judgment of the Police Magistrate.

It may be desirable that I should add a statement of my opinion that though there is no proclamation under the new Ordinance making the bridge of boats and the 10th mile stone tolling stations, the taking of toll at them or at either of them is not legalised by the new Ordinance. The old Proclamation of 20th November, 1851, is still in force to legalise the taking of toll in respect of the bridge of boats, at the bridge or at any place within ten miles of it. But then, if the parties are to be considered as acting under the old Proclamation, the complainant had already paid at the 10th mile station the toll for using the bridge of boats and was not bound to pay the same toll twice over.

Temple, J.,—I concur with the judgment just delivered by the Chief Justice, and as a further reason why under the Ordinance No. 22 of 1861, a Proclamation under the 9th clause is necessary, I would point out the wording of the other parts of the Schedule A, for instance see the 2nd line "on the road from Jayelle to Heneratgodde". Here no place is named for taking tolls and such can only be fixed by a Proclamation under the 9th clause, It is clear therefore that Schedule A. does not generally operate to fix stations, and I cannot see why it should have been intended to do so in one instance more than in another.

7th July.

Present :—Creasy, C. J., and Temple, J.

P. C., Trincomalie, No. 17,074. } *Cooper* v. *Catovava.*

P. C. Panwille, No. 2,254. } *Clarke* v. *Muttoosamy.*

P. C., Panwille, No. 2,262. } *Bain* v. *Carpen Chetty.*

The following is the judgment of the Supreme Court :—

In these three cases, the defendants have been respectively convicted "of having property in their possession knowing it to be stolen."

Guilty receipt of stolen property—plaint.

Does such a charge disclose any legal offence? We think not. This court has already quashed the sentence of a Police Magistrate where the prisoner had been convicted "of having stolen property in his possession." P. C. Badulla, No. 3,410, reported in *Lorenz,*

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p. 93. In the case before us the complaints certainly do say that defendants possessed the property knowing it to be stolen, but they do not say that the defendants *received* the property knowing it to be stolen. These charges are quite consistent with the following state of facts,—a man may have taken into his field goods brought there by another man without having at the time the slightest idea that the goods which were being placed in his field were stolen property, afterwards he may find out that they had been stolen, yet he may do nothing further in the matter, neither telling the Police nor removing the goods from his premises on the one hand, nor trying to hide the things by any fresh act on the other, but simply letting them continue to lie as before; such conduct would not be very creditable but it would hardly make him criminally punishable, certainly he would not be punished as a receiver under English Law, according to which the offence of receiving with guilty knowledge is not committed at all unless the receipt and the knowledge are simultaneous (see Lord Denman's words in *Q.* v. *Butler*, xi. Q. B. 944.)

We had the advantage of hearing a very learned argument from the Deputy Queen's Advocate Mr. Berwick, in which he cited numerous authorities to shew that according to Roman Dutch Law, the dishonest recipient of either the guilty taker of property or of the property guiltily taken might himself be punished as a thief, and held to have committed a *furtum nec manifestum* But even if we were to apply Roman Dutch Law with the English Law here, we cannot uphold these convictions. The authorities cited by Mr. Berwick might have some weight in establishing the proposition that these defendants could have been charged as thieves, but they have not been charged as thieves. They are only charged in the informal, and we think imperfect, manner which has been recited.

We were referred to clause 20, Ordinance No. 17 of 1844, as showing generally that the possession of stolen property is a criminal offence, but this clause is explained by reference to the preceding clause 15, which specifically makes it penal to possess certain specified articles unlawfully. We have no Ordinance like the Metropolitan Police Act in England, which makes generally the unlawful possession of property punishable on conviction. The Schedule of the present Police Act and the Schedule of the former Police Act give, both of them, the full and correct form for charging receivers of stolen property, and to adopt the words of our predecessor in the Badulla case already cited, if a prosecutor mean to charge a prisoner with having received stolen property knowing it to be stolen, he should say so in his complaint.

As it is, these prisoners do not appear in the face of the proceedings to have been convicted of any legal offence, and the convictions are therefore set aside.

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C. R., Kandy, No. 30,033. } *Duncan* v. *Kiria.*

Trespass—cattle damage feasant.

The facts are set out in the following judgment of the Court —

In this case the plaintiff sued the owner of a buffaloe for trespass committed by the animal in the plaintiff's guinea-grass field. It was proved that this buffaloe had habitually trespassed in this field for six or seven months, that it was very vicious, difficult to catch, and dangerous. It was at last shot under an order for that purpose from the Aratchy. Other cattle had trespassed on the estate, but some of these had been tied and damages obtained from their owners. The total damage done was above £40. The plaintiff's witnesses could not prove the exact amount of damage done by this buffaloe, and the Commissioner on that account dismissed his case with costs. The decision was clearly wrong. In an action for tort such as this, the plaintiff who proves that an injury has been done to him is entitled to a verdict though he cannot prove that the injury has cost him a farthing. Lord Holt's instance in *Ashby* v. *White*, Lord Raymond 938, is as good a proof as can be given. Lord Holt says: "A man shall have an action against another for riding over his ground though it do him no damage, for it is an invasion of his property, and the other has no right to come there."

In such a case, if there are no circumstances of aggravation, nominal damages should be given, but if the wrongful act was done maliciously, insolently, or with deliberate wilfulness, exemplary damages may and ought to be given, though no pecuniary loss had been caused. In the present case, had it been proved that the defendant has persisted in letting his buffaloe loose so as to trespass on plaintiff's land, after warning and requesting not to do so, the damages ought to have been augmented, and without that proof it must be taken here, that the defendant was acquainted with the habits of the animal that belonged to him, and having regard to the length of time during which this trespassing has been going on, there is abundant evidence from which it may be inferred, that the defendant intentionally left his buffaloe untied that it may graze at his neighbour's expense, relying on the animal's vicious temper and dangerous character as a security against its being caught and tied.

Here moreover there was ample evidence from which a sufficient estimate of damage done might be made, any one who knows what a buffaloe is, and what guinea grass is, can make a fair approximate valuation in such a case. Were we to uphold the doctrine of the Court below, it would follow that a man might have his whole crops destroyed by a number of stray cattle, each

belonging to different owners, and that he could not have any remedy for his loss, because he could not prove the exact quantity and value of the grass that any individual animal had eaten. 1863. July, 7.

The plaintiff has claimed a very moderate sum. He has now been twice erroneously nonsuited, and we shall not put him to the expense and delay of a third trial, but at once give judgment in his favour.

D. C., Colombo, No. 33,194. } *Wijesekera Appoohamy* v. *Peiris.*

Provisional judgment—pro. note—proof of endorsement.

The following is the judgment of the Supreme Court :—

Lorenz for appellant.

Dias for resdondent.

This is an appeal against an order for provisional judgment made in an action by the holder of a promissory note against the maker, The note was in the ordinary form, and was made payable to Cornelis De Silva or order. The plaintiff sued as indorsee. The defendant admitted on the pleadings that he was the maker of the note, but denied the indorsement purporting to be that of Cornelis De Silva, but no proof of this indorsement was given in obtaining the order for provisional judgment.

This is the ground of objection. A decision in this Court in a Colombo case, No. 16,732 reported in *Mr. Lorenz's* work on Namptissement p. 36, was cited in which this Court set aside an order for provisional judgment against the indorser of a bill, no proof having been given of presentment to the acceptor and default by him. The cases are distinguishable. An indorser is a surety and no right of action exists against him until the party primarily liable *i. e.*, the acceptor of the bill or the drawer of the note, has made default.

The present defendant is the maker of the note, and as such liable on it to the payee, so long as it is unindorsed by the payee to any honest transferer of it after such indorsement.

It is said that an order for provisional payment ought not to be granted unless the plaintiff gives proof of a complete prima facie case. We do not think that this establishment by plaintiff of a prima facie case is the principle of Namptissement. If it were we should expect to find Namptissement generally allowed in all actions on contracts, when a prima facie case is once by any means established. But the principle of Namptissement seems to be that where a defendant admits his signature to certain instruments

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or vouchers or entries which naturally import, and especially among mercantile men import, that he acknowledges a pecuniary obligation he shall be liable to have this conditional judgment made against him, the question of right to recover permanently being reserved for regular trial. It is true that this note until it was indorsed placed the defendant under a pecuniary obligation to Cornelis de Silva, the payee only. But we think that the maker of a promissory note must be taken to issue it with the knowledge and intent that it should be indorsed and so pass from hand to hand, and that it should form (as bills and notes have been truly described by Mr. Justice Byles as forming) part of the circulating medium of the mercantile world. Chief Baron Gilbert in a passage which Chancellor Kent adopts in his commentaries, vol. 3 *p.* 99, says very truly that "where one has done a mercantile act he subjects himself to mercantile law," and we think that makers of notes and acceptors of bills, when they have admitted their signatures to such instruments, and when the bills or notes purport to have been regularly indorsed, are liable to orders of this description when sued by the holders, leaving all questions of the sufficiency of the transfer for the regular trial of the cause.

Affirmed.

P. C., Colombo, No. 67,670. } *Perera* v. *Gomes* et. al.

Necessity of summons —Ordinance No. 18 of 1861

The following is the judgment of the Supreme Court:—

This important case which expressly raises the question of the necessity of a summons in proceedings before our Police Courts, and which also require the consideration of other points of practical interest, was rightly reserved for hearing before the full Court. It was ably argued on the 15th of last month, and we have devoted much care and time to its decision.

The facts of the case, so far as material for the question now raised, were as follows:—The defendants were originally apprehended on a charge of assault under a warrant issued by Mr. Dalziel who was a Justice of the Peace and also the Police Magistrate of Colombo. The warrant was issued by him as J. P. and the defendants were brought several times before him as J. P. for examination, but the case was always adjourned At last on the 10th February last, all parties being present, a direction was given in the presence of all parties and with the consent of all parties that the case should be disposed of in the Police Court. The parties were warned to attend accordingly, and the following day,

the 11th February, was named as the day on which the case would be taken. On the 11th all parties accordingly did attend, and the defendants had their counsel and witnesses with them. 1863. July, 7.

A plaint for assault was then entered under the Police Ordinance. The Magistrate reports that he ascertained that the parties were ready, and the case then proceeded by the plaint being read to the defendants, by their pleading not guilty, and by witnesses on both sides being examined and cross-examined in the ordinary manner ; the case for the defendants being conducted by counsel, no objection whatever being raised to the regularity of the proceedings and no application being made for any adjournment.

The result of the trial was a conviction against which the defendants now appeal, and their main ground of appeal is, that the Police Court proceedings were fatally defective for want of a summons. Another objection taken incidentally during the argument was, that Rule 5, of the Police Court Rules Ordinance was not complied with, which requires that after the entry of the plaint a day for hearing shall be fixed and notified. But the main objection was the want of a summons and the counsel for the appellant maintained that a summons is indispensably necessary in all Police Court cases whatever.

On the other side the counsel for the respondents have argued,

1st.—that the clauses in the Rules Ordinance on the subject of a summons are directory only.

2nd.—that the only object of a summons is to bring the party before the Court, and that therefore when he is before the Court already, no summons is necessary.

In coming to a decision of this case, we have had to consider:—

1st.—whether a summons is ever absolutely necessary ?

2nd.—whether a summons is always absolutely necessary ?

3rd.—whether, irrespectively of the point about the summons, there is any irregularity on the face of these proceedings ?

4th.—whether if any such irregularity exists, it is under the circumstances fatal ?

The Kaigalle case (P. C., No. 18,266,) has been especially referred to in argument. The Pantura case (P. C., No. *) and the Kandy (P. C., No. *) are in point upon the present inquiry to which may be added the Worthington case (Jaffna, P. C., No. 1882,) in which there was no difference of opinion

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* *Sic* in the " Civil Minutes."

1863. July, 7. — among the Judges as to the principles, though there was a difference of opinion as to the application of principles to the facts of that particular case.

None of the judgments in those cases is at all inconsistent with the two principles which we have endeavoured to uphold while determining the question which arise in the matter in our present adjudication.

Those principles are :—

1st.—That if the proceedings before one of these minor tribunals have been so irregular as to deprive the defendant of any substantial safeguard or privilege which the law intended to give him, a conviction based on such proceedings ought to be set aside.

2nd.—Trifling irregularities which do not prejudice any substantial right are not fatal, especially if they were not objected to at the time. Our object being two fold, 1st, to ensure to accused parties a fair trial according to law, and 2nd, to prevent justice from being defeated by mere special pleading about unimportant technicalities.

We will first deal with the position maintained by the respondents that the clauses in the Rules Ordinance respecting summons are directory only, which is tantamount to saying that a summons in a Police Court may be desirable but is never necessary.

We cannot assume the authority to say this. To pronounce those statutary regulations directory only, and that they are things which men may please themselves about obeying or disobeying is practically to repeal the statute *pro tanto*. We cannot take it on ourselves to annul a main part of the Rules Ordinance, especially as the Police Court Ordinance itself (see clause 14) evidently designs that the regular general way of proceeding in these Courts shall be by way of summons. We use the term " general way" advisedly. We shall presently see that there are some exceptional cases. But we have no doubt that as a general principle the proceeding by way of summons is the proper mode to be followed in a Police Court case. It is a valuable safeguard to the accused. It tells him what he is charged with, it tells him who it is that accuses him, it tells him so that he is enabled to consult his friends, to collect his witnesses, and make himself ready to meet the charge preferred against him. The Court has held, (and we think it is rightly held) that a conviction ought to be set aside in a case where the summons did not contain the name of the complainant or state the case with sufficient certainty, Matale, P. C., No. 9,534, reported in *Lorenz,* p. 192, and the P. C. Ordinance under which those proceedings took place did not differ from the P. C.

Ordinance so far as regards our present inquiry. The decision is incompatible with the doctrine of its being optional to issue a summons or not and that decision points out the reason why a summons is (as a general rule) salutary and necessary proceeding. 1863. July, 7.

We will now address ourselves to the 2nd position of the respondents in support of which several authorities were cited, namely in their allegation that " the object of a summons is to bring the party before the Court, and that therefore when the party is already before the Court, no summons is necessary." With the addition of a few words this position is sound, but the words which we would add to it are very material. We would state it thus: " the object of a summons is to bring the party before the Court with full and fair waning why he is brought there, and therefore when it is clear that the party is already before the Court with such full and fair warning, a summons may be unnecessary."

It is needless to repeat our remarks just made about the advantages which the proceeding by way of summons gives to an accused party, and we must believe those advantages to have been objects which the Legislature had in view just as much as the advantage which a summons gives the prosecutor of having his adversary brought into Court by it. With this understanding of the objects of a summons, we think the respondents right so far as they maintain that the want of a summons may not be fatal, when it is clear that the defendant has come before the Court without a summons, but that he also has stood there with as full advantages for his defence as he could have enjoyed if a summons had been served on him.

We have, now unavoidably stated by anticipation our opinion as to the main objection raised by the Counsel for the appellant in its broadest form, namely, that a summons is absolutely necessary in all Police cases whatever.

But we have considered this point not only with reference to the general principles which were chiefly relied on by the Counsel for the respondent in maintaining his last mentioned position, but also with careful attention to the words for our Ordinance and to the previous decision of our Courts. We think that they all warrant us in holding, both that there are cases in which a summons is not necessary and the present case is one of them. As we have already stated, we consider that the Legislature intended the proceedings in the Police Court to be commenced as a general rule by way of summons, but there are parts also of other unrepealed Ordinances which clearly show, that the Legislature contemplated the existence of many cases in which accused parties were to be brought before Police Courts without summons and in which the introduction

1868. July, 7. — of a summons into the proceedings would be an useless, nay, a mischievous formality. Turn for instance to clause 19th of the Police Ordinance 17th of 1844, which require the Police to apprehend, and bring before a Justice of the Peace or the Police Magistrate, as the case may require, the offenders of various classes therein mentioned. Many of them are obviously offenders with whom a Police Court is to deal and who are not to be set before either a District Court or the Supreme Court for trial, such are for example, "the idle and disorderly persons found breaking the public peace and the offenders against the vagrant laws." The Public interest requires that such personages shall be taken at once, and brought when taken before the Court. Why should they have to be detained for the formality of a summons? A summons if instantly returnable would be a mockery ; if it involved a delay to next day, it would cause great hardship to the majority of such offenders who could not get bail and would have to be locked up for twenty-four hours more, instead of being fined and discharged at once We shall see presently that the law gives safeguards which insure to prisoners so arrested an adjournment, if necessary, to prepare their defence and get their witnesses. But to look on a summons in such cases as requisite, seems utterly unreasonable, Look also at the 15th clause of the Police Court Ordinance which enacts that "every person apprehended within the jurisdiction of any Police Court, for any crime, offence, matter or thing cognizable by such Court shall be brought before such Court, if then sitting, immediately, or if otherwise, on the first sitting thereof, after his apprehension and the Magistrate of such Court shall proceed forthwith to try him or in the event of a postponement being necessary may bind him over in recognizances to appear before such Court on some early day then and there to take his trial upon the charge preferred against him ; or in the event of his failing to enter into such recognizance may commit him to prison until such early day."

On first looking at this clause as it stands in the present Ordinance it might be supposed that it was limited in its operation by the 14th clause which speaks of warrants granted by the Police Courts when there is proof that a summons would be ineffectual. But we find that this clause is in substance a re-enactment of clause 6th of the said Ordinance No. 11 of 1843. The operation of that clause was certainly unlimited nor do we see any reason for holding the corresponding clause in the new Ordinance to be less effective. We cannot hold that a summous is necessary when prisoners already in lawful custody are fairly and without any oppressive purpose brought before a Police Court Magistrate for summary trial as by this clause ordained. We hardly suppose that it was intended to argue that, in cases where under the Police

Act itself, the complainant obtains a warrant, on showing that a summons was useless, the admittedly useless summons ought to issue as well as the warrant. This exception must have been tacitly implied when the general rule for the necessity of a summons was alleged. 1863. July, 7.

Now let us look to what our Ordinance ordains about the mode of proceeding with an arrested man, and see if they do not as far as possible secure for him the advantages which a summons would have given. In considering this, we shall see whether any irregularity (independent of the objection about summons), and if so what kind of irregularity, has been committed in the present case.

It has been always thought, and rightly thought, that the entry of a plaint is necessary. Then the 5th rule requires the appointment of a day for hearing, and the 20th rule (which is the most important) orders that " if on the day named in the summons or on any day appointed for the hearing of the complaint, the defendant shall be present in Court, and both parties shall be ready to proceed to trial, the plaint shall be read and the trial proceed." These clauses appear to us to be as general as the clause about the entry of the plaint, and the 20th clause contemplates cases where there are no summons, as well as where a summons has been issued. The direction spoken of in the 5th clause as to the entry on the record of the day for hearing is little more than a formality so far as regards the interest of the parties, but the 20th clause which directs the case to proceed *if both parties are ready* is of much more moment. Of course it does not mean that a defendant is to put a trial off as often as he pleases by merely saying that he is not ready, but if he has any reasonable grounds for not being ready, as for instance, that on account of his having been just arrested he has had no time to obtain legal advice or procure the attendance of witnesses, the trial ought not to proceed, but in the case before us no objection of the kind arises. The Police Magistrate ascertained the parties' readiness to proceed before he allowed the trial to begin the mere formal objection that the appointment of the time for hearing is not noted in the record cannot be held to be such an error as prejudiced the defendant in his substantial right, when we know, that the time for hearing had been virtually arranged by the parties themselves, and that they attended at the time in pursuance of such arrangement. It remains to say a few words about the cases that have been alluded to in the hearing of the present.

In the Kaigalle case P. C., 18,266, which has been referred to, the defendant had been bailed to come before a Justice of the Peace to undergo examination. They went accordingly for that

1863. July, 7. — purpose. They had no legal adviser. The Justice suddenly assumed his other character of Police Magistrate, and forthwith dealt with the case in that capacity. We thought that the mere fact of those defendants, poor and ignorant men, unassisted by counsel, not making a formal objection to the proceedings was not enough, we thought there had been a violation of the great principle that men before they are tried, and convicted as criminals ought to have as full and fair notice as possible of why and how they were to be tried. The present case, where men, assisted by counsel, agreed before hand to their mode, place, and time of trial came fully prepared to it, is of a totally different character. Unquestionably in the Pantura case, we held that even the express consent of defendant's Proctor could not legalize the breach of a cardinal rule of the criminal law. There the whole of the evidence against the prisoner was taken without oath or affirmation. No comparison can be made between such a serious illegality, and the clerical omission here to note the time of hearing on the record. In the recent Kandy case the defendant was brought before a Magistrate by an arrest illegal in itself, and this illegal arrest was made the machinery for subjecting him to a Police Court trial. None of these cases can govern the present one. The Worthington case is much more in point, where, though one member of the Court regarded certain irregularities as serious which the majority held to be unimportant, we all agreed that slight irregularities, especially if not objected to at the time, would not be fatal to a conviction. Such is the character of the only irregularity that we can discover here, namely the non-entry of the time of hearing.

In conclusion, we repeat our belief that as a general rule the proceeding by way of summons is the proper, the legal, the constitutional mode of proceeding in Police Court cases, except when the public peace and security require the prompt arrest of a wrong doer, or where it is clearly shown that a warrant is necessary in order to secure the appearance of the accused to stand his trial. But we cannot find reason for maintaining that a summons is universally and absolutely indispensable in Police Court cases, and the circumstances of the present case plainly shows that nothing has been done in it or left undone so as to cause the slightest prejudice to the defendant in any substantial right.

P. C. Nuwera Ellia, No. 4,927. } *Rodrigo* v. *Marie Muttoe*, et al. 1863. July, 7.

Labor Ordinance—desertion of service—gross neglect of duty—payment of wages.

The judgment of the Supreme Court sets out the facts of the case :—

This was an appeal against the conviction of three Kanganies for alleged gross neglect of duty and desertion of service without due notice.

As the neglect of duty consisted in the desertion of service, it is to be considered as a desertion of service case simply.

To make the prisoners punishable under the Ordinance No. 5 of 1841 under which this charge is preferred, they must be found not only to have left the service before the end of their term of service, or legal warning, but to have done this without reasonable cause.

The question in the present case is, did the defendants respectively leave without reasonable cause, if not they ought not to be convicted.

The facts of this case are peculiar ; and the result of our examination and consideration of them is to leave a substantial doubt on our minds as regards the first and second prisoners, of which those prisoners are entitled to the benefit.

It appears that on the 21st of May last, when the three prisoners refused to go on with their work, and left the estate, the two first had not had their wages for five or six months, it appears that the first prisoner had commenced an action against his employer for his wages, and it further appears that the three prisoners by their Proctor had given their employer a written notice that they would leave the service because there had been no payment of wages for five months.

On the other hand, it was stated that the prisoners had not verbally asked for their wages, that the first prisoner had been absent from the estate, and that the payment could not be made in his absence, and that advances, had been made to the prisoners though the first prisoner had re-paid eight pounds, and balances were still due to the first and second prisoners. It was also held correctly enough that the Proctor's letter was not in itself a sufficient notice to quit. The fact of the prisoners not having verbally asked for their wages is counteracted so far as the first prisoner is concerned by the fact that he had, eleven days before he went away, issued a summons for them and that they had all warned their employer by their Proctor's letter that the consequence of non-payment would be that the prisoners would go away.

Then comes the point that the first prisoner had been absent, and that payment could not be made in his absence. On this we observe that there is no proof how long he had been absent, and

1863. July, 7. — there is proof that he had been present and working for some time before the 21st of May, so that there was an opportunity of settling with him, and any difficulty which his absence might have made as to settling with the others was removed. Indeed it appears in another part of the case that the third prisoner's wages were settled at the end of March. Moreover as to the duration of the period of the 1st prisoner's absence we must observe that it is a rule in criminal cases that were evidence is left vague, which the prosecutor might if he chose, have made explicit, nothing is to be presumed against the prisoner, but the presnmption is to be rather the other way,—we certainly cannot presume that the first prisoner's absence had been for any considerable period, and that a sufficient reason has been thereby shown for not paying the wages.

The same remark, that nothing is to be presumed against a prisoner, applies to the very vague evidence given by the prosecution that advences had been made to the first and second prisoners, which evidance is coupled with the admission that the first prisoner had repaid £8 on account of the advances and that balances are still due to the first and second prisoner. If those balances were trifling it was very easy for the prosecutor to say so, and to supply us with the figures. He does nothing of the kind as to the first and second prisoners.

We have it proved as a definite fact on the other side that at least five months wages were due and what ever may have been the rate of wages, the aggregate of five months wages must have been a serious sum to those prisoners. This is met by a mere vague assertion of counter advances, the unrepaid amount of which we, in the absence of any evidence to the contrary, must presume to be inconsiderable. On the whole we cannot come to a determination that a servant whose wages, except so far as regards some inconsiderable set off, have not been paid to him for five months, who has summoned his employer for this wages, and warned him that leaving the service will be the consequence of non-payment, had no reasonable cause for leaving when he finds that payment is still withheld. Of a former decision of this Court P. C. Trincomalie, No. 1,133, *Supreme Court Minutes,* June 10th 1853, in a case of a similar nature we will only remark for the present that we are disposed to extend the application of the doctrine there laid down, and that the facts of that case were much stronger in favor of the prisoner than the facts of the case now before us as respects the first and second prisoners.

With regard to the second prisoner, his case only differs from that of the first in that it does not appear that he had issued a summons for his wages, but it does appear that he had the warning letter sent in his behalf as well as that of the others.

With regard to the third prisoner, the case is very different. It was distinctly proved by Mr. Hood that this prisoner had been paid up to the 31st March. and that he had received advances since then, so that less than a month's wages was due to him when he struck work. So far therefore as he was concerned the assertion in the warning letter that wages had not been paid for 5 months was a palpable uutruth.

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We certainly are not going to lay down a general rule that servants whose wages are not all in arrear, whether to a large or to a small amount, can leave their master's service without regular notice or that they are not punishable under the Ordinance in question for so doing. Each case must be ruled according to its own circumstances, among which it is material to see whether the amount in arrear is considerable, and of long standing so as to make it a serious hardship on the servant to compel him to stay to work on without payment till he can give a legal notice to quit, and until the term of that notice shall have expired.

The case as against the third prisoner falls precisely within the authority of the Trincomalie case already alluded to, in which a full Court decided that the facts of the previous month's wages being in arrear did not justify a servant leaving without notice during the second month. As we have said we are not disposed to extend the operation of the principle of that case, but neither do we see cause for utterly over-ruling it. The reasons for it are briefly given in the judgment itself, and their full meaning does not perhaps appear at first sight as was intended. We do not adopt it as strictly asserting that there is an interval at the end of each month of the service during which brief interval the servant is as it were uncovenanted, and free to renew or to decline to renew his contract. The second clause of the Labourer's Ordinance says that the monthly contract of service shall be renewable from month to month, and shall be deemed, and taken in law to be so renewed by the parties unless a week's previous notice be given not to renew. Consequently as soon as a day of the last week of the month has past by without notice given, the parties must be taken to have renewed the contract for the following month ; but the servant may be fairly takeu to have renewed it for the following mouth on the faith that his wages for the current month will be paid according to contract at the end of the current month when they fell due. If they are not so paid, he may be held at liberty to repudiate the contract of renewal which he made, on the faith that an engagement would be kept on the other side, which the other party breaks when the time comes for keeping it, namely, at the end of the month when the wages fell due. But if he does not then at once repudiate it, then he may be taken to adhere to

1863. July, 24. his contract of renewal, and cannot afterwards plead the non-payment of old wages as an excuse for leaving without notice ; understanding the Trincomalie decision in that sense, we do not feel called on to over-rule it so far as it strictly applies, and it does strictly apply, to the case of the third prisoner. But as we have said, we are not disposed to stretch the law of that case any further by making it apply to instances where not one month's, but many months' wages are in arrear, where it may be reasonably supposed that the servants at the end of the month was willing to keep to his renewal of the contract for another month, but was compelled by the hardship of his case to quit abruptly before that other month expired. We must further observe generally with regard to the case of all the three prisoners that it is always necessary to consider whether the alleged cause was really the motive for the servants' leaving. There is much in this case, especially the evidence about the first prisoner telling the second and third not to work, and their alleging his order, and not the non-payment of the wages, as the reason for their refusal to work, which makes us strongly to suspect that the conduct of all three arose from a wrongful combination among them against their employer. But suspicion is not enough to convict men in criminal cases, and when we weigh the facts of the case in favor of the first and the second prisoners with the facts against them, we feel a considerable degree of doubt about their guilt, of which we are bound to give them the benefit.

With regard to the third prisoner the facts in his favor are much weaker, and on the whole we do not feel any substantial doubt about the propriety of his conviction. The objection about variance which has been taken, we think immaterial. The prisoner could not properly have been misled by it, and it has in no way prejudiced his substantial rights.

July, 24.

Present :—Temple, J., and Thomson.

D. C., Colombo, No. 2,784. } In re *Mrs. de Raymond*, deceased.

Stork, applicant.
Piachaud, opponent.

Appeal—R. & O. for District Courts, sec. viii, § 4. —Testamentary cases.

Temple, J.,—In this case the respondent Mr. Stork applied for probate to the last will of Mrs. de Raymond. The appellant Mr. Piachaud opposed the grant, but the District Court decided that probate should be granted to Mr. Stork. Against this de-

cision an appeal has been lodged and the question now before the Court is whether the appellant Mr. Piachaud should give security under the 5th section of the Rules of Court. The District Judge having decided that he must give security for the full value of the estate, it has been contended by the respondent's Advocate that not only the probate but the property of the testatrix is in litigation, and that under the 4th clause of the 8th section of the Rules of Court, security must be given for the full value of that property, the subject of that litigation. 1863. July, 24.

With this view I do not concur. I consider that the probate only is in question, the granting of which vests in the executor the right of collecting and administering the property and vests, that property in him when ascertained and collected. It does not always happen that the person opposing the grant of probate is in possession of any of the property of the estate, and it sometimes happened that the property named in the will has no real existence in which case there would be no ground for requiring security in appeal, and though in this case the appellant admits he possessed property, still it appears that he does so as trustee or administrator. Therefore the having probate would not necessarily vest the property subject to those trusts in the executor, but it has been said that the District Court in deciding what security must be given must ascertain the value of the property. This would involve an enquiry into the trust deed and the District Court would have to decide whether or not those trusts were at an end by the death of the testatrix,—an enquiry which I do not think could or ought to be made in a testamentary case. Being therefore of opinion that the probate only is directly in question in this case that the property is uncertained and only indirectly concerned and that the question of granting probate does not necessarily take the property from the appellant, I do not think he can be called upon to give security.

The judgment therefore of the District Court requiring security in appeal is set aside and the appeal is allowed without security except for costs.

THOMSON, J.,—This appeal arises out of the trial of a will in the District Court of Colombo in which probate was granted to the appellant Mr. Stork. The opponent has appealed against the grant of probate and was decreed by the Court below to furnish security (under the 4th clause of the 8th section of the rules and orders page, 83) to the full amount of the property mentioned in the will, before being permitted to prosecute this appeal. Against this latter decree ordering security the opponent further appeals and it is this last appeal that the Court is now called upon to decide.

1863. July, 24. — This order or decree of the court below is founded on the 3rd and 4th clauses of section 8th of the Rules and Orders which provide that in appeals against final judgment decree, orders or sentences, security shall be given by the appellant for the due prosecution of the appeal and other matters to an amount defined in those clauses.

The Queen's Advocate appeared with *Mr. Lorenz* for the appellant, and the first point raised was that section 8th does not apply to appeals in Testamentary cases, notwithstanding that it has been the practice to apply those Rules to Testamentary cases ever since the time of the framers of the Rules.

I am of opinion that they do apply. The Rules divide the jurisdiction of the District Courts into Civil, Testamentary, Matrimonial, and Criminal Jurisdiction in the first instance; but when the Rules come to speak of appeals, they divide the appeal not into jurisdiction but into matters, *i. e.*, civil and criminal matters, words more extensive than the word jurisdiction. I think that in the general acceptation of the phrase used, an appeal from the Testamentary jurisdiction is a civil matter. And the Rules' intent is so to be taken. I am confirmed in this view from the reflection that if civil matters are to be confined to civil jurisdiction, there will be no Rules for appeals in Testamentary and Matrimonial causes, and we should be driven to the conclusion that the framers of the Rules thought that Rules for appeals in Testamentary and Matrimonial causes unnecessary,—a very forced conclusion, as it is plain that there is the same occasion for such rules as in the civil and criminal jurisdiction.

Again the language of the Rules in section 8, points to Testamentary jurisdiction. The opening words of clause 1st of section 8, and also of the amended Rule of the 12th December, 1843, are, "Every party intending to appeal from any judgment, decree, sentence or order, &c.," these words include technical names of the decisions of the three classes of Civil Courts in England the word "judgment" principally applying to the Common Law Courts "decree" to the Equity Court and "sentence" to the final decisions of the Ecclesiastical Courts their determination being called either *interlocutory decrees* or *definitive sentences.* It is impossible to perceive why the word "sentence" was introduced into these clauses unless the framers of the rules looked to decisions of the District Court in its Testamentary jurisdiction, in the nature of the definitive sentences of the Ecclesiastical Court upon whose regulations the Testamentary Rules of the District Court are modelled. I am therefore of opinion that the Rules in section 8 and as amended on 12th December 1842, do apply, as far as they can be applied, to the Testamentary and Matrimonial causes of the District Court.

It was further urged by the counsel for the appellant that the sentence granting probate is an interlocutory order in the cause, and therefore excepted from the rule requiring security under the proviso attached to the 3rd clause of section 8; the other side contending that the sentence is final. It is perhaps unnecessary to determine whether the sentence is final or interlocutory, because if it is interlocutory no security is required, and if it is final it can only be final as to the probate, the only question yet decided and the only subject of litigation yet mooted, which, being neither "moveable property, money, debt, personal demand or land that has changed condition," cannot under the rule of the 4th clause of section 8th be made the measure of security. To say (as contended by the respondent) that the decision as to probate is a final sentence in the cause, and that nevertheless the actual property passed under the will is the subject of litigation is to blow hot and cold; for if the property is the final issue, probate must be interlocutory, but if probate is a final sentence, then the property is not yet litigated. 1863. July, 24.

I deem it however advisable to determine in this case whether probate is an interlocutory decree or a definite sentence. I am of opinion that probate is (as in the English Ecclesiastical Courts), in the Testamentary jurisdiction of the District Court, of a definite sentence, that is a final judgment. I have not had time to refer to the rules and proceedings of the modern Court of Probate, nor is it necessary as the Testamentary Rules of this Colony follow the old and not the new rules of probate in England. There appears to be no English decision as to whether probate is an interlocutory decree or definite sentence, indeed it could not be expected, for, although in general in England probate is followed by inventory, yet there were provisional Ecclesiastical jurisdictions in the country, in which inventory preceded probate and in which probate was the last act of these Courts; but though inventory here follows probate, I think probate to be a final judgment.

Interlocutory judgments are those given in the middle of a cause upon some plea, proceeding or default which is only intermediate and does not finally determine or complete the suit, such, for example, as a judgment on a plea in abatement or a judgment in demurrer, where an issue of fact is yet to be tried or a judgment by default, where the damages have yet to be assessed; or generally any decision which establishes a right but does not hand over to the plaintiff the specific thing sued for, whether that be damages, debt, a chattel, land, a title or a trust. Final judgments are those that at once put an end to the suit by declaring that the plaintiff has either entitled himself or has not to recover or obtain the specific thing (corporeal or incorporeal) that he sues for.

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Now a suit for probate (which this is) is a suit to determine the validity of the testament and is also for a claim for a trust, and the probate itself "commits the administration of the estate to the executors named in the will." Surely this is a final award of the specific thing sued for by the plaintiff, that is, the decree finally declares the testament valid and for the purpose of carrying out that trust appoints the executor.

But it is said that probate is followed by the inventory ; yet it does not follow that, even if it is not the last act of the Court, it is, in such suit as this, in reality the last decree of the Court : for the inventory and account are ordered and decreed in the probate itself, and all that the Court subsequently does is to see its own decree carried out just as execution is ordered after final judgment or committal for contempt after the non-performance of a trust previously decreed. It was urged by Mr. Lorenz that new executors might be appointed by the Court ; but that would merely be by a decree supplementary to its definite sentence of probate for the purpose of bearing to its ultimate usefulness that final judgment. Therefore, I am of opinion that the rules in section 8, **do** apply to Testamentary matters and that probate is a final judgment and not an interlocutory order. Yet nevertheless I think security is not required for permission to prosecute an appeal against a definitive sentence of probate, because the rules do not order that security, when any thing not "moveable property, debt, personal demand or land affected in its actual occupation" is the subject of litigation. The declaration of the validity of a testament is none of these things. The reason of the exception will be found in Marshall's Judgments, page 22, and it is shewn there that the security is in part given because the subject of litigation is in part endangered by the delay of the appeal ; as the subject of litigation in this case is the validity of the testament, it is difficult to see how it could in any way be endangered by the delay of an appeal, and even if I had adopted the view of the respondent and looked upon the estate ultimately to be passed as the subject of litigation, it may be very reasonably asked how is its value to be computed or can it be computed at all ? The Court below computes by the property named in the bill. That is plainly wrong, especially in this case where part of the present property so named is in trust and nearly all the remainder in the hands of an administrator. Several well-known instances can be cited of wills bequeathing property actually not even existing ; even in sensible wills, debts and other charges are seldom noticed. Nor can we adopt the view of the respondent that the Court is to take evidence of the property likely to pass under the will ; plainly that would be prejudging all the actions that might possibly arise

upon the will and in the absence too of the possible parties to those actions : besides, the complication on this question of security would be endless were such a rule to obtain. I therefore agree that the decree of the Court below as to security be set aside and the appeal allowed without security ; as to the subject of litigation, security for costs has been given and in all cases security for costs must be given.

1868. August, 11.

11*th August.*

Present :—Temple J.

P. C., Point Pedro, No. 20,017. } *Super* v. *Somer*, et al.

Order of Court—its execution by police officer—resistance.

This was a charge of resisting an officer of police in the lawful execution of his duty. The circumstances are set out in the following judgment of the Supreme Court :—

In this case one S. Moragaser makes an affidavit before the Justice of Peace in which he states that one C. Somer was his agent, in which capacity he was entrusted with some copperah and jaggery to the value of £52, that he the said agent is fraudulently making away with the same &c., and prays that a search warrant may be issued to seize the said goods and that the accused be sent for and due protection and justice be administrated. Upon this affidavit, the Justice of the Peace made the following order : " that the goods abovementioned be placed under the immediate and safe custody of the Vedhans" (present complaint) " until decision of the case about to be instituted in the District Court of Jaffna, as it is beyond the jurisdiction of this Court."

The Vedhan then went to execute the order, when C. Somer and his wife locked the door of their house and refused to let them take the list of the property. The Vedhan then entered the present charge against C. Somer and his wife and two others for resisting them in the lawful execution of their duty, against the 17th clause of the Ordinance 15 of 1843, evidence is heard and C. Somer and his wife are found guilty and each fined £2 10.

The Supreme Court considers the whole of the proceedings irregular. The complaint in the Justice of Peace case was not a criminal one; but one which was cognisable only by a civil court where the complainant (S. Moragaser) before the J. P. had a full remedy under the Ordinance 15th of 1856 : the proceedings are therefore quashed and the defendants discharged.

1863. Sept. 10.

8th September.

Present :—Creasy, C. J., Temple, J., Thomson, J.

C. R., Matara, No. 7,837. } *Moheedeen Bawa* v. *Jayasingha.*

Custom—proof of—its legality.

The following judgment of the Court is sufficiently explicit:—

The Supreme Court is of opinion that a very important question is involved in this case ; but it ought to be raised properly on the pleadings. The defence suggested by the evidence for the defendant appear to consist of the following propositions :—

1.—That by the custom of the country where the land in question is situated, every inhabitant has a right to turn out his cattle at a certain period of the year to pasture on any unenclosed land, whether cultivated or not.

2.—That the defendant being an inhabitant turned in his cattle according to the said custom at the said season. That the plaintiff's land was then unenclosed, and that the defendant's cattle entered the said land and pastured on it according to the said custom—which are the matters complained in the plaint.

The defendant as his answer at present stands, is not entitled to judgment on any of his pleas. The evidence in support of such a custom ought to be very full and clear, and it will be important to ascertain whether ever, (and if ever how often) any land owner in the district has warned cattle owners not to pasture cattle any longer on his land though unenclosed. Whether such warnings have been obeyed or enforced or not, and whether (and if so how often) cattle have been seized or their owners sued for trespass on unenclosed ground, and what has been the result of such proceedings. Supposing that custom to be properly pleaded and to be fully proved in fact, the very important question, whether such a custom can be good in law, will be ripe for decision, which it is not as the proceedings at present stand.

10th September.

Present :—Creasy C. J., Temple, J., and Thomson. J.

P. C., Colombo, No. 70,275. } *Migel Pulle* v. *Frederick.*

The complainant's appeal was dismissed in these terms :—

Toll Ordinance.

The appellant in this case passed the draw-bridge in a cart drawn by two bullocks. The cart had passengers in it but no goods. The toll-keeper made the appellant pay 4½d. which is the toll fixed by the Ordinance for a vehicle drawn by two oxen. The

appellant contended that he ought not to have been obliged to pay more than $1\frac{1}{2}$d., the appointed toll for a vehicle not conveying a load and drawn by two oxen. He summoned the toll-keeper for the overcharge, but the Magistrate decided in the toll-keeper's favor, and we think rightly. 1868. Sept. 14.

The Pantura case (P. C. 3,515) is an express decision of the Supreme Court on this very point and on the present Ordinance. It decides that a cart which is actually carrying passengers is, while it so carries them, liable to toll as a vehicle for passengers.

The appellant craftily set out in his petition of appeal, part of a Balapitty Modera case (P. C. 24,213), which as read in his petition seem to be in his favor. But we have sent for the record itself, and on examining it, we find that in that case there were no passengers at all in the cart and the case is consequently no authority whatever as to the one before us.

The balance of authorities on the old Ordinance is decidedly in the respondent's favor.

An ingenious argument has been addressed to us in this case founded on the interpretation clause in the new Ordinance, and it is urged that a cart ought to pay toll only as an unloaded cart though it may be crowded with passengers, unless it is a vehicle framed peculiarly for the conveyance of passengers, and habitually employed for that purpose. But we think the words on which the learned counsel has relied were inserted with a very different object. The Ordinance intends to make a distinction between carts generally used for loads of dead weight and between regular vehicles for passengers, so far as regards the tolls they respectively pay when empty. Full toll is to be paid for regular passenger carriage when ever it passes a toll whether it be full or empty. But an empty cart is allowed to pass on payment of a reduced toll. But if the owner takes passengers in his cart, he makes the cart for that occasion a vehicle for passengers, and he must pay accordingly.

14th September.

Present:—Creasy, C. J., Temple, J., and Thomson, J.

P. C., Kandy, No. 56,658 } *Hay* v. *Carolis.*

Justice of peace—refusal to execute warrant—Ord. No. 15 of 1843, cls. 5, 13 and 15.

The complainant, a Justice of the Peace, charged defendant, a police serjeant, with refusing to execute his warrant. The defendant, being convicted, appealed.

The *Queen's Advocate* for defendant appellant.

Dias for respondent.

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The conviction was quashed in these terms :—

This was a complaint against the defendant for refusing to execute a Justice's warrant.

The defendant was a police serjeant in the Kandy Police Force which has been established by Proclamation in and for the Town and Gravets of Kandy under Ordinance 17 of 1844. At the time in question, the defendant was resident at a building called a Police Station at Kaduganawa, and he had there constables also of the Kandy Police force acting under him.

The complainant is a Justice of Peace for the District of Kandy.

On the 29th of May last, the complainant, as such Justice, issued a warrant to take Arouasalem Caugany into custody on a criminal charge. The only part of the warrant which is material for the purposes of the present enquiry is the direction which was as follows :—

" To the police serjeant of Kaduganawa."

The warrant appears to have been delivered to the defendant at Kaduganawa and the complainant saw the defendant at Kaduganawa and personally required him to execute it. The defendant refused to do so ; and he gave as a reason for his refusal that the warrant was not countersigned by Captain Drew. Captain Drew is the Superintendent of the Police Force at Kandy.

The complainant summoned the defendant for this refusal ; and the complaint, before the Police Magistrate, as finally amended, charged the defendant with refusal to execute the warrant, contrary to the provisions of clauses 5 and 15 of the Ordinance No. 15 of 1843. The counsel for the appellant at the argument before us disclaimed all techinical objections and pressed for our decision on the important substantial question that arises in this case. We have dealt with the case accordingly and have considered whether the defendant committed any offence under the Ordinance. But we must not be misunderstood as sanctioning by our silence the correctness of any portion of the formal proceedings in the case which we do not specially notice in the present judgment.

The Police Magistrate decided that the defendant could not be convicted of neglect of duty as a police officer, but he convicted him of a neglect of duty imposed on him as a private individual by clause 5 of the Ordinance, by part of which it is in effect enacted, *inter alia,* that warrants may be directed to private persons and may be lawfully executed by them.

This conviction has been appealed against and we think it was wrong.

In the first place, the defendant whom it is now sought to

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treat as a private person, was not applied to act as a private person, but as a police officer. The warrant was not directed to him by name. The direction is simply, "To the police serjeant of Kaduganawa." This is a matter of substance, the power given by a warrant which is directed to a man by the name of his office is very different from that given by a warrant directed to a man personally by his own name. The case of the *King* v. *Urin*, B. & C. 288 is an express authority on this point.

But there is a still graver and a still more important objection to the present proceedings. The decision of the Police Magistrate assumes the law to be that a private person who is *authorised* to execute a warrant is also *compellable* to do so, and that he is punishable under this Ordinance if he wilfully neglects to do so. This is entirely wrong. The counsel for the respondent in the argument before us gave it up as untenable. But the matter is of such general and practical importance that we think it right to set out somewhat fully the reasons and authorities which shew that though a private person may be authorised to execute a Justice's warrant which is properly directed to him, he is not obliged to do so. The present conviction could only be upheld by the combined effect of the 13th and 16th clauses of the Ordinance. It is the 13th (not the 15th) which imposes a penalty on private persons, and the words of the 13th clause which apply to this matter are as follows :—

"Every private person failing to perform any of the duties hereinbefore imposed on him without good and sufficient excuse shall be guilty of an offence and be liable on conviction thereof to the payment of any fine not exceeding one pound or to imprisonment for any period not exceeding one month"

We must now see whether the execution of a warrant by a private person is or is not "one of the duties herein before imposed."

The words of clause 5th which has been supposed to justify this conviction are as follows :—

"It is further enacted that every Fiscal and his deputies and others, his officers and all headmen, constables, superintendents, and officers of police and all peace officers whatsoever, are hereby authorised and required to obey and execute every warrant of apprehension issued or endorsed by any Justice of the Peace of the District for which such officers of the Law has been appointed to act any where within such District, provided always that any warrant of apprehension which shall be specially directed to any such officer or to any private person shall have effect and may lawfully be executed without any endorsement as aforesaid by such officer or private person anywhere within the Island."

The difference of wording of the mandate of this clause as to the policemen, constables, &c., and as to the private persons, is obvious. The Ordinance expressly authorises and requires every constable officer of police &c., to execute within his District the

1868. Sept. 14. — warrants of Justices. All it says of private persons is that warrants specially directed to them shall have effect and may lawfully be executed by them any where without the endorsement of another Justice. Still, if the clause in the Ordinance which precedes the 13th contained no other provisions about private persons than what we have just read in the 5th clause, it might be argued that this provision in the 5th clause must be held to have imposed a duty, or else the words in the 13th clause could have had no operation at all. The 6th, 9th, 10th, 11th and 12th clauses, all speak of things done by private persons, and an examinaion of these clauses shews that when the legislature intended to authorize and also to require private persons to act, it has carefully used the words authorise *and* require. Where it is meant only to give power and not to impose obligation, the words of requirement are omitted. Then the 6th clause (which is closely connected with the 5th) authorises the persons to whom a warrant is specially directed to pursue and seize. It does not say that he is required to do so. But the 9th which is intended to enforce the common law duty, which every one is under, of assisting a Peace Officer, when called by the officer to do so, expressly says, that every private person is hereby authorised and required to assist; so the 10th clause, which deals with the cases in which certain heinous crimes are committed in a private person's presence and also with some other cases of the same kind, expressly says that such private person is authorised *and required* to act. But we then come to the 11th clause, by which any private person *may* arrest for certain crimes upon reasonable suspicion, but does so at his peril if the arrested person prove to be innocent. It would be manifestly absurd and unjust to make it obligatory on any man to arrest under such circumstances; and accordingly we find that this 11th clause does not contain any words of requirement, it only says it shall be lawful to do so and so. On the other hand, when we proceed to the 12th clause, which is meant to enforce the obvious duty which every good subject is under of doing his best to stop affrays and breach of peace committed in his presenee, the Ordinance uses the words authorises *and requires*.

We therefore can have no difficulty in applying the penal words of clause 13 which affect every private person who neglects any of the duties imposed on him by the preceding parts of the Ordinance. The 9th, 10th, and the 12th clauses which expressly *authorise and require* a private person to do certain specified things clearly "impose duties on him" within the meaning of the 13th section. The 5th, 6th and 11th which do not contain any words of requirement with regard to private persons, do not impose any duty on them within the meaning of the penal provision of the 13th clause.

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If it had been attempted to urge, on the other hand, that whenever a power is given for the public benefit the law will imply a duty to exercise that power, the reply would have been that this doctrine is not of uuiversal application and that English authorities both in the text books and in cases precisely analogous to the present are clear, ample and decisive against the present conviction. We have indeed no doubt that the Ordinance before us was intentionally framed with reference to the English law as to the powers and duties of constables and of private persons respectively in the execution of justices' warrants, and that it was not designed to place private persons in Ceylon uuder any greater liability in such matters than private persons are in England. Now the English law is express that, though a private person may be authorised to execute a warrant specially directed to him, he is not compellable to do so. Thus Hale says (Pleas of the Crown, vol. 1, p. 581) " the justice that issues the warrant may direct it to a private person if he pleases and it is good; but he is not compellable to execute it, unless he be a proper officer."

Hawkins says (vol. 1 p. 135) of the justice's warrant " that it may be directed to the sheriff, bailiff, constable or to any indifferent person by name who is no officer ; for that the justice may authorise any one to be his officer when he pleases to make such ; yet it is most advisable to direct it to the constable of the precinct wherein it is to be executed, for that no other constable, and a *fortiori* no private person, is compellable to serve it."

Chitty in the vol. 1st of his Criminal Law repeats the same doctrine, nor indeed is there any discrepancy among the numerous text writers on the subject.

And the importance of the omission of words of positive requirement in any statute, which like our Ordinance gives power to execute warrant, is strikingly shewn in the case of *Gimbert* v. *Coyney*, in McCleland and Young's reports, vol. 1, p. 469. There, an Act of Parliament 6, Geo. iv. c. 18, had enacted that it should and might be lawful for constables to execute warrants addressed to them in their official character beyond the precincts for which they held office, if such place was within the jurisdiction of the justice who issued or endorsed the warrant. The plaintiff, a constable in that case, had declined so to execute a warrant so addressed to him and for that refusal he was fined for neglect of duty, under 33 Geo. 3 c. 58. c. 1.

The Court of Exchequer held the conviction to be bad and ruled that the constable, though empowered, was not bound to execute the warrant under the statute. The whole of the law, as to how far the words of the authority are also words of obligation as to the discharge of public duties, is well discussed in the argument of that case.

1863 Sept., 14. — We feel certain that the present conviction of this defendant for breach of duty as a private person was erroneous, but this complaint was laid against him really under clause 15th of the Ordinance for neglect of duty as a police officer, and we have considered whether he was punishable in that capacity. The Magistrate has simply said that this defendaut was only a peace officer, in consequence of his being one of the police force established by Ordinance and Proclamation in and for the town and gravets of Kandy. The 5th clause of the Ordinance required him to execute any where within his district the justice's warrant. But Kaduganawa, where he was called on to act, was not within the district of the Kandy police force. But it has been suggested that as the defendant had assumed the appearance and the position of the peace officer at and for Kaduganawa, the law would not permit him to evade the execution of duty by disclaiming the character in which he had held out himself to the world. Numerous cases would be found which shew that a man who has assumed an official character and misconducted himself in that character, shall not be allowed to deny his character when sued for such misconduct. Whether the doctrine would apply to cases of mere non-feasance and not of mis-feasance is a question which it is not necessary to determine here, because the defendant never assumed the character of a peace officer except as a police serjeant, that is, a member of the regular police force established under the Police Ordinance No. 17 of 1844. It was only as such police serjeant that he was called on to act in this case, and as a police serjeant he had a perfectly valid excuse for not executing this warrant, which he adverted to at the time, and which he set up more fully when before a Police Magistrate. Clause 17 of Ordinance 17 of 1844 (by which the present police force was established) says expressly that the warrant to be executed by any officer of the police shall be directed to the superintendent; and clause 18 gives the valuable power to justices to "direct their warrant to the superintendent to be executed at any place within the jurisdiction of such Justice of the Peace, and such superintendent is hereby authorised and required to execute or cause the same to be executed by some officer of such force any where within such jurisdiction." But it is to the superintendent himself, and not to any of the inferior officer, that the warrant is to be directed. And there is obviously a good reason why it should be so. To make a police force of any value, it must be kept well organised and under efficient control. The chief of such a force must know where each of his men is, and how employed by others and sent away on such employment for their station at any time without knowledge. The words of this Ordinance No. 17 of 1844, are explicit on the subject and no reason has been or could be suggested why we should

seek to narrow their natural meaning. It follows that, as the warrant in question purported to be a warrant to be executed by an officer of the police force created by the Ordinance No. 17 of 1844, and as the warrant was not directed as required by that Ordinance, it was an illegal warrant and no punishment ought to follow the refusal to execute it. We cannot for a moment accede to what was thrown out in behalf of the respondent that the direction of a warrant is mere matter of form. On the contrary, all authorities concur in treating it as a matter of seriousness and of substance. It will be enough for us to quote as to this the emphatic words of Mr. Justice Bayley, in pronouncing the judgment of the Court of K. B. in the case (already referred to) of the *King* v. *Meir*, B. G. 288. "It is of great consequence that Magistrates should be careful to direct their warrants in such a manner that the parties to be effected by that may know that the parties bearing the warrants are authorised to execute them. The importance of giving such information will be easily admitted, when it is remembered that according to the extent of the officer's authority his death may be murder, manslaughter and perhaps justifiable homicide."

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The result of the examination of this case is, that we hold the defendant not to have been punishable, either as a police officer or as a private person, for refusing to execute this warrant, and the conviction is accordingly quashed.

22nd Septemper.

Present :—Creasy, C. J., and Thomson, J.

C. R., Kaigalle, No. 3,265 } *Miskin* v. *Hadjie Marcair*

Lorenz for plaintiff appellant.

Action for damages—right to recover—nominal damages.

The following is the judgment of the Supreme Court, setting aside the decree of the Court below :—

The plaintiff in this case claimed six pounds and eight shillings as the value of the Government share of the produce of certain land of the defendant's, which share plaintiff had purchased.

The Commissioner decided that the lands were liable to the tax, but non-suited the plaintiff, because he had not, in the Commissioner's opinion, proved what was the produce of the lands in question, and had therefore . failed in proving the amount of damages to which he was entitled.

This non-suit was erroneous. It is clear that there was some produce yielded by the land, and that the plaintiff therefore was entitled to something? where a plaintiff proves that he is entitled

1863. Sept., 22. — to something, but gives no proof of the amount of that something, the proper course is not to non-suit him, but to give him a judgment with nominal damages.

In the present case however one of the plaintiff's witnesses gave evidence, from which it may fairly be inferred, that the crop of this season was about half an ordinary crop ; and the other evidence shews that the plaintiff's share of an ordinary crop would be worth £6 8*s*. It is to remembered that the precise amount of the crop was a fact peculiarly within the defendant's knowledge, and that if the plaintiff's witness had over-valued it, it was easy for the defendant to correct him, but the defendant called no witnesses.

We think it clear on the evidence that these lands were liable to the tax, and we consider that the justice of the case will be met by giving the plaintiff a judgment for half the value of an ordinary crop.

Judgment for plaintiff for £3 4*s*.

D. C., Caltura, No. 421. } In re *Packir Tamby*, deceased.

Administrator—removal for maladministration—Procedure.

The following is the judgment of the Supreme Court, affirming the order of the court below :—

In this case an administrator obtained an order for the sale of real property. It does not appear to have been opposed on the grounds of his having funds in hand, or of no more funds being wanted for the winding up of the estate, or of there being moveable property which ought to be disposed of first. But an immense number of objections are raised to his original right to administration and to his conduct, since he has been such. If a man misconduct himself as administrator, the court can upon proper application and proof remove him, and should be applied to, to do so. But as a general rule, his whole conduct should not be the subject of adjudication in a proceeding such as the present. There may be cases in which, in order to prevent immediate mischief, and when the misconduct of the administrator has only just come to the objector's notice, the court may properly decline or delay to strengthen his hands in dealing with the estate. But as a general rule, it seems against principle and against the true interest of all concerned to keep a man in office as administrator and yet to cripple him in the performance of his duty by not allowing him the power which

is necessary to wind up the estate. It does not appear on the proceedings that the present applicant's cross motion was brought before the court when this order was made. If it had been erroneously disallowed, the parties might have appealed against such disallowance and we would have inquired into it. But as the case stood before the District Court Judge, we do not see that his order permitting this sale was wrong, and we therefore affirm it.

1863. Sept., 22.

P. C., Kaigalle, No. 19,382 } *Thwaites* v. *Pedro Appoo.*

Malicious Injuries' Ordinance —cls. 19 and 20.

The defendant was charged with having, on the 24th August, 1863, wilfully and maliciously killed, with a stick, three ducks belonging to the complainant, in breach of clause 19 of the Ordinance No. 6 of 1846. Defendant pleaded in justification that he had warned complainant, that, as the ducks in question were doing much injury to his field, the paddy whereof was ripe, he would destroy them if he found them there again ; and that subsequently on the day in question seeing about twenty ducks in the field, he threw a stick at them which hurt two, but did not kill them. It was in evidence that the warning had been given, and that the defendant did hit the ducks on the head and kill them. The Police Magistrate pronounced the following judgment :—

"The beating of the ducks, instead of chasing them or throwing the stick at them to drive them out, showed an intent which the court thinks renders the defendant liable to punishment. He, however, doubtless acted under the belief that he had a right to destroy the ducks when trespassing in the field. He should have had the damages, if any, assessed. The defendant is convicted, and fined two shillings."

Defendant appealed. The Supreme Court set aside the conviction in these terms :—

"The Police Magistrate finds that the defendant acted under a belief that he had right to do the act complained of. Such a belief was fair and reasonable. The 20th clause of the Ordinance shews that he ought not to have been convicted."

1863. Sept., 22.

D. C., Negombo, No. 1,025. } *Perera* v. *Anthony*..

Illegal contract—promise to break a marriage agreement.

Dias and *Lorenz* for plaintiff appellant, *Ferdinands* for respondent.

The decree of the Court below was affirmed in these terms:—

The real agreement in this case was an arrangement between the plaintiff and defendant, that the defendant should break his promise to marry Dona Maria. The defendant was at the time legally as well as morally bound to keep that promise; and a contract for breaking it was illegal and cannot be enforced.

D. C., Galle, No. 1,712. } In re *Hawa Umma*, deceased. *Sinne Lebbe*, applicant. *Abdool Cader*, opponent.

Administration—Executor of administrator.

This was a contest for letters of administration. The husband of the intestate abovenamed (who left no issue) had obtained letters of administration, but died without completing the administration. He however left a will appointing Abdool Cader his executor, who opposed the application of Sinne Lebbe, one of the surviving brothers of the intestate, for administration *de bonis non.*

The learned District Judge found as follows:—

I can find no reason why the claim of the next of kin should be disregarded, and that of the opponent preferred. The individual interest of the present applicant is doubtless much smaller than that of the opponent, but, considered in connection with that of the applicant's co-heir, is equal to it; and there is no reason why the administration of the whole estate should be committed to a stranger. In nominating an administrator for his wife's estate, the original administrator has usurped an authority which appertains to the court alone. Administration *de bonis non* is hereby committed to the applicant as the brother of the intestate.

The opponent appealing, the Supreme Court set aside the order of the court below, and ordered letters of administration to be granted to him (the executor of the administrator), in the following judgment:—

As the point was open to fair argument, the application of the next of kin may be considered to have been reasonable, and this reversal is therefore without costs. The District Judge seems to have followed the antiquated rules of the English law in Ecclesiastical Courts in this respect, and not those by which they have been superseded. No personal unfitness is imputed to the executor of the administrator, and Williams on Executors, (Ed. 5,) Vol. 1, p. 414 *et seq.*, seems to us to establish that the executor ought to be preferred.

D. C., Jaffna, No. 12,142, } *Vettivaloe* v. *Vyraveepulle.*

1863. October, 22.

Arrest on civil writ—appearance on a criminal charge—legality of arrest.

The order of the Court below was affirmed in these terms :—

This appeal complains that the appellant was arrested on a civil writ in a criminal court after having appeared before that court to answer a criminal charge. The discharge from criminal process, even in consequence of an acquittal, confers no protection, unless it should appear that the apprehension on criminal charge was a mere contrivance to get the party into custody in the civil suit.

The court below reports that the criminal charge was not concocted although there was no criminal evidence. It would also appear that the defendant was in fact arrested and escaped so that he would have been re-taken.

22nd October.

Present:—Creasy, C. J., Temple, J. and Thomson, J.

P. C., Pantura, No. 4,659. } *Fernando* v. *Peris Appoo.*

Irregular proceedings—attempt to over-awe the Supreme Court—contempt.

In this case the appeal was dismissed in these terms :—

This is a charge for "crossing the toll station at Pantura with a bullock cart, in breach of the 17th clause of Ordinance No. 22 of 1861, without paying the toll duty." At the hearing of the case the charge laid in the complaint was abandoned ; there was no amendment of the plaint, but with the proceedings in their original form (in which they still remain), the parties before the Magistrate entered on a long enquiry, whether the defendant had or had not committed the totally distinct offence of evading toll by turning off the road on to land that was not a highway. The Magistrate has given an elaborate judgment on this point which we are asked to review in appeal, and to give an opinion whether the land on which the defendant drove his cart is or is not a highway ; that is to say, we are asked to give a judgment on matters not legally on the record. We shall do nothing of the kind. We consider that the whole proceedings before the Magistrate, from the time when the counsel for the complainant abandoned the complaint on which the defendant was summoned, were irregular, and that the finding of the Police Magistrate as to the road not being a highway was extra judicial. The charge on which the defendant was brought to trial was not proved and the judgment for acquittal is therefore, but for no other reason, to stand affirmed.

1863. October 24. — We cannot pass over a very serious impropriety of another description that has been committed in this appeal. The appellant has annexed to these proceedings an answer from His Excellency the Governor to a petition by the toll keeper about the evasion of the toll at this spot. In that answer the toll keeper is informed that he has the remedy in his own hands by prosecuting the evading parties. This has obviously been laid before us with the view of influencing and over-awing our judgment on the question, which the appellant expected us to consider, whether the ground on which people turn off so as to avoid the toll bar is or is not a highway. Such a conduct towards the Supreme Court is contempt of the grossest kind, and we should have dealt with it accordingly if we had not observed (which we observe with surprise and regret) the Police Magistrate authorised the annexation of this document on the record.

24th October.

Present :—CREASY, C. J., TEMPLE, J. and THOMSON, J.

D. C., Galle, No. 20,041

Writ against person—interest and costs—Ordinance No. 7 of 1853, cl. 164.

In this case plaintiff obtained judgment against defendant for £10 14*s.* 5*d.* with interest, and cost £2 19*s.* 9*d.* and issued writs for recovery of the amount of judgment and costs. On the 11th September, defendant was served with a copy of writ against person, and made a payment of £10 14*s.* 5*d.* to the Fiscal. On the 15th the defendant was again arrested, on a copy of the writ issued from the Fiscal's Office, for interest due and costs. The defendant moved that he may be discharged on the ground that his arrest was irregular, and the court below, after hearing arguments pro. and con. discharged him.

On appeal, this order was affirmed as follows :—

Without entering into the reasons of the court below, the Supreme Court thinks this defendant was rightly discharged. The arrest from which he was discharged was not for costs only, but for interest on debt, which interest did not amount to £10 (Ordinance No. 7 of 1853 clause 164.)

27th October.

Present :—Creasy, C. J., Temple, J., and Thomson, J.

D. C. Kornegalle, No. 14,559. } *Kaloo Menika* v. *Punchyralle.*

Kandyan Law—disinherison—marriage with low-caste man—wrong-doer.

The Supreme Court affirmed the decree of the court below as follows :—

The defendant has entirely failed to make out the charge of gross profligacy which he brought (most discreditably to himself) against his sister, the plaintiff. As to his charge that plaintiff has degraded the family by marrying a low caste man, it is proved that the defendant drove her to contract that marriage by his ill-usage, and his illegal refusal to afford her the maintenance in the paternal house to which she was entitled. For the defendant now to cause the plaintiff's disinherison by setting up that marriage against her would be to allow him the advantage of his own wrong.

5th November.

Present :—Creasy, C. J., Temple, J. and Thomson J.

D. C. Kaltura, No. 7,552. } *Don David* v. *Perera.*

Arrack Ordinance—informer's share—recovery and distribution thereof.

In this case the second defendant was fined, he having pleaded guilty to a breach of the 33rd clause of the Ordinance No. 10 of 1844. He petitioned the Governor for a remission of the fine, upon which His Excellency remitted a half.

Warrant of distress issued. On the 23rd July 1863, the complainant appeared and claimed half the fine as informer. The arrack renter also claimed half of the fine as actual informer, whereupon the Judge ordered the fine to be recovered in the usual way and deposited in the Kutcherri, and the arrack renter was referred to a civil action.

On the 3rd August, the second defendant appeared and filed an affidavit together with a copy of the receipt which was granted to him by the informer, and moved that the warrant of distress may be recalled.

The following order was then made. "It is ordered that "the warrant of distress be recalled, on the defendant giving good "and sufficient security to abide the result of the civil action for "the ascertainment of the question, as to who is the party entitled "to the informer's share."

1863. Nov., 6. On appeal the Supreme Court delivered the following judgment :—

"The second accused has brought by his appeal the order of the 3rd August 1863, before the Supreme Court, and he complains that the order is illegal. We agree with him and quash that order, but on very different grounds from that relied on by him in the subsequent part of his petition. The appellant ought to have paid the fine imposed on him into court, or else it ought to have been recovered from him by the process of the court. No transactions out of court, between them and the person whom he chooses to consider the informer, should be recognized by the court. The clause of the Ordinance (63) which distributes the fine, says that the informer is to have half "of all fines actually recovered and realized." These words shew clearly that the fine is in the first instance to be received by the court, and it is for the court then to determine who is entitled to the informer's share ; order to be set aside, and warrant of distress to be re-issued.

6th November.

Present :—Creasy, C. J., Temple, J. and Thomson, J.,

P. C., Chilaw, No. 1,569. } *Juanis Naide* v. *Christian.*

Assault with a broom stick —" trumpery" case— power to dismiss.

The judgment in this case was set aside, and the case remanded for further hearing, in these terms :—

When an assault without legal justification is proved, it is the duty of the Magistrate to convict. He has no power to dismiss the case as the Magistrate here has done, because he thinks the assault was of a trifling nature. Such power is expressly given to Justices in England, by Geo : iv. c. 31 §§ 27 and 28 ; but we have nothing in our Ordinances analogous, to that part of the English statute law. The best way to discourage "trumpery" charges of assault (the phrase used by the Magistrate here), is to inflict a nominal penalty, such as a fine of a farthing, or imprisonment for one hour ; and there are cases in which it may be proper for him to use the powers given to him by the 19th and 21st clauses. But the assault should be very trifling and the case decidedly "trumpery," to make such a course proper. The Supreme Court gives no opinion whether the present case is trumpery or not. The Police Magistrate had better decided that, after hearing all the witnesses, which does not seem hitherto to have

been done ; and he should also ascertain whether beating with a broom stick is or is not considered by the natives to involve a very gross insult on account of the nature of the weapon employed.

1863. Nov., 10.

10*th November*.

Present:—CREASY, C. J., TEMPLE, J., and THOMSON, J.

P. C. Colombo, No. 70,626. } *Rev. Manzoni* v. *Gooneratne and others.*

Public worship—disturbance of—[Ordinance No. 16 of 1865, cl. 89]—intention to disturb—Buddhist procession.

The defendants were charged with having maliciously and wilfully disturbed the performance of public worship, between the hours of 9 and 10 a. m., at St. Anna's Church at Navagamme, in breach of the 36th clause of the Ordinance No. 17 of 1844.

Plea not guilty.

The Magistrate, after evidence taken and considered, pronounced the following judgment :—

This is a charge preferred by the officiating Roman Catholic priest of Navagamme against the defendants (kapporalas) for disturbing the performance of public worship at St. Anna's Church on Sunday the 2nd August last. The evidence discloses the following facts. 1st, that the complainant was celebrating Mass in St. Anna's Church on Sunday the 2nd August, between the hours of 9 and 10 in the forenoon. 2nd, that he and his congregation felt themselves disturbed by certain noises which emanated from a Buddhist procession moving along the lane which is within a fathom or two of the Church. 3rd, that in consequence of such noise outside, the complainant was obliged to suspend the service for a few minutes until the procession had moved on. Now it is not denied that the defendants were at the time, as Buddhists, in the exercise of certain religious rites of theirs, and that in the forenoon in question they were returning from the river in procession with beat of tom-toms, &c., after the performance of a ceremony called by them "the cutting of water," immemorably performed by them year after year. Such being the real facts of the case, I am of opinion that the charge cannot be sustained, and that it should be dismissed. The facts proved do not in my judgment amount to a disturbance under the provisions of the Ordinance No. 17 of 1844 ; and I hold that the accused were at the time in the lawful exercise of their religious rites. The accused are adjudged to be not guilty, and are discharged.

1863. Nov., 13. — On appeal, *Lorenz* appeared for the appellant, and *Dias* for the respondent. The judgment of the Court below was affirmed, as follows :—

We agree with the Police Magistrate in thinking that the defendants were bona fide engaged in a religious ceremony of theirs, and cannot see sufficient proof of the defendants having had any intention to disturb public worship in the church, or of their even having been aware that public worship was going on in the church when they passed by it after "cutting the water." No one remonstrated with them, or told them that they were disturbing a congregation ; and there is no proof of there having been any thing to inform them that the church, when they re-passed it, was not in the same condition that it was in when they had passed it on the other way to the river. Unquestionably the words of the Ordinance on which the complainant relies are very strong, but they do not over-ride the great general principle of *actus non facit reum nisi mens sit rea.* We followed this principle in deciding the case of P. C., Kaigalle No. 16,940 (as reported in *Beling* and *Vanderstraaten*, 160), notwithstanding the strong words of the Ordinance on which that case proceeded, and that principle was acted on by the English Court of Queen's Bench in the case of *Reg* v. *Sleep*, 30 L. J., M. C., 170.

13*th November.*

Present :—CREASY, C. J., TEMPLE, J., and THOMSON, J.

P. C., Galle, No. 440. } *Henry* v. *Anderson.*

Irregular proceedings—defective plaint—other irregularities.

The defendant Captain of the ship "Martha," was charged with illtreating complainant, by keeping him in low diet, and having him hand-cuffed on board the ship "Martha," against the Merchant Shipping Act of 1854. The defendant pleaded not guilty to the illtreatment, but admitted putting complainant in irons.

On appeal against a conviction, the Supreme Court delivered the following judgment :—

The proceedings in this case are so scriosluy irregular, that the Supreme Court feels bound to quash the conviction. The complaint is for illtreating the plaintiff by keeping him on low diet and having him hand-cuffed on board the ship "Martha" at Galle Harbour, against the Merchant Shipping Act of 1854.

This Act (17 and 18 Vict : 104) contains 548 sections, and it has been varied and enlarged by the Merchant Shipping Amendment Act, 1855. The appellant alleges as a grievance on him (and we think he has cause to do so) that the complainant gave him no notice as to what provision of this multifarious Act he was summoned under. And there are still more important errors on the face of these proceedings. The defendant does not appear to have been called on for his defence, or to have had an opportunity given him of producing witnesses. One reason assigned by the Magistrate for finding the defendant guilty in this case is, that the defendant had been found guilty of assault in another case. There was no proof of this, nor could proof of it have been legally given, unless the defendant himself had raised the question of his general good and humane character. The Police Magistrate then proceeds in his judgment to give directions about a matter not judicially before him, *i. e.* the complainant's right to obtain his discharge, saying that he does so, because the complainant deposes to being in fear of grievous bodily harm from further illtreatment from the defendant. Nothing of the kind appears in the evidence taken in the case. The whole proceedings are seriously irregular, and substantially erroneous.

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D. C., Colombo,* No. 34,430. } *Page* v. *Eduljie.*

Auction sale—purchaser in default—power of re-sale—conditions of sale.

The *Queen's Advocate* (with him *Lorenz,*) for defendant appellant, *Dias* for respondent.

The following is the judgment of the Supreme Court :—

The plaintiff's cause of action on which he sued the defendant in this case was alleged in the libel to be substantially as follows : the plaintiff declared that the defendant had agreed to purchase the hull of the stranded ship " Nova Scotia," on certain conditions of sale, stipulated, among other things, that the purchaser should pay the plaintiff a deposit of 10 per cent. on the purchase money, and that the plaintiff should have the right of re-selling the vessel, if the purchaser failed to complete his purchase ; the deficiency of the purchase money, if any at such second sale, to be made good by the defaulter who had purchased at the first sale. The libel averred a default on the part of the defendant to complete his purchase, and a resale at a loss of £520

* See *Appendix* for judgment of Privy Council.

1863. Nov., 13. which, with the expenses, the plaintiff claimed from the defendant, after deducting the amount of the paid deposit.

The defendant by his answer denied having purchased the property on the conditions alleged by the plaintiff. There were other pleas and other defences, but as they have nothing to do with the point on which we determine the case, it is needless to set them out here.

The hull of the "Nova Scotia" was sold by auction. It appears to us to be quite clear, on the evidence, that the conditions of sale, which were circulated before and during the auction, and which were read out by the auctioneer at the commencement of the sale, were not the conditions relied on by the plaintiff and annexed to his libel, but were a different set of conditions, which the defendant has annexed to his, the defendant's, answer. These last mentioned set of conditions contain nothing to give the vendor a power of resale, in the event of the purchaser making a default. They stipulate for a payment of £25 per cent deposit.

The defendant was the highest bidder for the hull of the stranded ship, and the lot was knocked down to him. In the ordinary course of auctions he thereby became the purchaser, according to the conditions which the auctioneer had read out, and subject to the necessity of complying with any statutory requisites as to such sales which may be imposed by the Ordinances of this Colony.

No point was made in the argument of this case as to the non-compliance with the provisions of the Shipping Acts, as to the mode in which property in a ship can be transferred. We do think it necessary to consider the point in this judgment, because it is a clear fact in the case that no such formal transfer of the ship was made at all. If such a formal transfer is indispensable in order to give validity to the sale, or to make it amount to at least a valid agreement for a sale, the plaintiff is out of court for default of such a transfer having been effected.

After the sale the defendant paid the deposit of 25 per cent (stipulated in the conditions which had been read out.) This payment satisfied the requisition of the Ordinance No. 7 of 1840, sec. 21, and the sale and the purchase of the ship's hull were thereby made valid and completed according to our colonial laws; and unquestionably the sale and purchase were made and the deposit paid under the conditions of sale read at the auction, and not under those which the plaintiff set up, but of which not a word had been said in the transaction until after the deposit money was paid.

After the payment of the deposit a set of conditions of sale,

which did contain a clause of resale, and which are annexed by the plaintiff to his libel, were signed by the defendant at the auctioneer's office. The evidence of the parties as to the precise circumstance under which they were signed is not uniform. We have no doubt that the defendant signed them in full confidence that they were identical with those read out at the sale. But even if he knowingly signed conditions, which imposed the new obligation on him of paying any loss arising from a resale, such fresh agreement would be insufficient to maintain an action, being entirely without consideration. 1863. Nov., 27. —

It has been urged that the right of re-sale always exists, and that the vendor had it here independently of the stipulation in the signed set of conditions of sale. This is clearly shewn not to be law by the case of *Martindale* v. *Smith*, 1. Q. B. 389, and other authorities cited in *Tudor's Leading Cases* on Mercantile and Maritime Law, p. 530. et. seq.

Judgment for plaintiff is set aside, and judgment for defendant with costs to be entered.

27th November.

Present :—Creasy, C. J.

P. C., Kandy, No. 57,605. } *Roosmale Cocq* v. *Grisford* and another.

Theft—obtaining goods under false pretences.

The conviction of the accused was affirmed as follows :—

We think that both these defendants were guilty of an attempt to steal. It is clear that they acted throughout in confederacy, and with a fraudulent purpose, and they had done enough towards the accomplishment of their criminal design to make them legally punishable.

The only real question in the case is whether if they, had actually obtained the £2, it would not have been a mere case of obtaining by means of fraud and false pretences, and not a case of theft. The question whether obtaining goods by false pretences amounts to theft is at present under the consideration of the Supreme Court in a Crown case reserved ; but we do not think it necessary to postpone the present case until that point is decided, as there are distinguishing facts there which make it a case of theft, and not of false pretences, even if the most rigorous stipulations of the English law as to the ingredients of the theft were followed. Mr. Roosmale Cocq from whom the money was sought to be obtained, had only a limited authority over it. It was the Crown's money, entrusted to him for the specific purpose of pay-

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ing it over to the carters and others who had really done work on the roads. And according to English law, in such a case the person who obtains the property by falsely representing himself as the person or as one of the persons for whom it is designed, is guilty of larceny. Sec. R. v. Longstreeth, R. & M., C. C. R. 137, cited in 2 Russel, 29 & 80 (ed. of 1843.)

D. C., Galle, No. 20,260. } *Rose* v. *Black*

Charter-party —loading and discharging, &c.

On appeal by defendant, *Dias* appeared for him and the *Queen's Advocate* for plaintiff.

The Supreme Court set aside the decree of the Court below and entered up judgment for defendant, as follows :—

We think the defendant's construction of the charter-party is correct, the words at the beginning " shall after the discharge of her cargo of salt in Calcutta load there from charterer's agents a full and complete cargo of rice" plainly and naturally mean, that the loading of the rice is to be after the discharge of the salt. There is nothing in the rest of the instrument to contradict this. The subsequent stipulation that the working days are to commence from the time when the master gives notice that he is ready to load are to be taken in connection with it. The combined meaning is that the working days for loading the rice are to commence as soon after the discharge of the salt as the master gives notice. We have been referred to a case in 3 Maule and Selwyn 309, *Storer* v. *Gordon,* where it was held that the non-delivery of an outward cargo was not an excuse for not loading a return cargo on a charter-party which provided that the ship should deliver her outward cargo " having so done receive on board a return cargo." In that case, the vessel delivered no outward cargo and could deliver none inasmuch as the outward cargo was seized by a foreign Government. So here, if the plaintiff's ship had on board no cargo of salt to discharge at Calcutta, we should not have held the non-discharge of salt to be an excuse for not loading rice, but in that very case of *Storer* v. *Gordon,* Lord Ellenborough said that the words in that charter-party " rather intended to make the time when the plaintiff's obligation to receive a homeward cargo should attach, viz. when the ship from being clear of one cargo should be in a condition to receive another." In that spirit we read the present charter-party and hold that the reciprocal obligation to load and to receive the rice attached at the time when the ship was clear of her cargo of salt.

3rd December.

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Present :—Creasy, C. J., Temple, J., and Thomson, J.

C. R. Negombo, No. 5,159. } *Carron* v. *Pieris.*

Witnesses—their expenses—trials before Police Court—English Law—Civil Law.

The following judgment of the Supreme Court sets out the facts of the case :—

This was an action brought by the plaintiff for his expenses in attending, as a witness in a criminal case before the Police Court of Negombo, in which he had been subpœned at the instance of the defendant. The Commissioner who tried the case non-suited the plaintiff on the ground that there was no pretence of any express contract by the defendant to pay the witness's expense and that there was no implied legal obligation on him to do so.

The judgment delivered by the Commissioner, when he decreed the non-suit, is a very able one, and we should have felt satisfied in simply affirming it for the reason given by him, had it not been for the great practical importance of the question which this case raises for adjudication, and which has not, so far as we can discover, been previously determined in this colony.

The payment by the public of witnesses in criminal trials before the Supreme Court is provided for by the Ordinance. So is the remuneration to medical witnesses in some specified cases. But we have now to consider whether in the great number of other criminal proceedings which occur, a witness is or is not bound to attend on proper summons and give evidence, as a matter of public duty, or whether he has the same right, as a witness in a civil case, to insist that the party who brings him to the court shall pay him the reasonable cost of coming thither, remaining there and returning thence ?

The Civil Law and the English Law are certainly at variance on this point. The general principle of the Civil Law is this : "producendi in judicio teste sumptibus producentis qui etiam ipsis "testibus subministrandi sunt, ad iter et ad se exhibendos quamdiu "testimonii causa detinentur ac distringunter ne officium damno-"sum sit." This is laid down by Voet in his Commentary on the Pandects, xxii. 15. The passage from the original Roman Law, which he quotes is to the same general effect ; and the 4th book of the Code, xx, 16, expressly ordains that *all* witnesses are to have their expenses : "Omnibus testibus sine damno et impendio suo vult factas de his interlocationes et productiones procedere."

The English Law is widely different. It gives a witness in all cases a right to his expenses, and he may refuse to give his evidence until they have been paid. But in criminal cases this is not so. A statute has indeed provided that where a witness is sum-

1863. Dec. 3. — moned from one distant part of the United Kingdom to another, he need not obey unless his expenses are paid. Other statutes make the costs of witnesses for the prosecution in certain cases payable by the crown. But as a general principle, the English law considers it to be the public duty of every citizen to obey a summons to give evidence in a criminal court; and the party at whose instance he is subpœned is not bound to remunerate him. It is hardly necessary to cite authorities on this, but the law will be found laid down and explained in Taylor on Evidence 1002, and in Starkie, vol. 1 p. 83. Now, inasmuch as the Ordinance introduces the English Law of evidence into the Colony (3 of 1846), except (by sec.5) so much as regards the payment of expenses of witnesses, it might seem, at first sight, that our path seems clear; and that we were to avoid the English Law and follow the Civil Law in this matter. But a little reflection will show that such is not the case.

The reason for the difference between the Civil Law and English Law as to the payment of witnesses in criminal trials is caused by the difference between those two systems of jurisprudence as to the nature of criminal trial. In English Law it is a proceeding taken in the interests of the public and by the public only,—compensation to the injured individual is not one of its objects. In the Civil Law, the two objects, that of punishing the offender and of compensating the injured individual, are very generally combined.

Hence in the Civil Law, a witness in a criminal court is entitled to claim his expenses from the party calling him, because the proceeding is generally one carried on to a great extent for individual advantage, between man and man, and not wholly and solely for the general protection of the community against wrong-doers. Now whatever may have been the system of criminal jurisprudence in this respect, which was followed here in the Dutch times, it is certain that for more than half a century the English principle has prevailed of treating a criminal trial as a proceeding instituted and conducted solely for the public benefit, and not for the private advantage of any single member of the community. One of our ablest predecessors, Sir Charles Marshall, in the valuable reports on the Administration of Justice in this Island, prepared by him when Puisne Justice of the Supreme Court in 1830, has observed on this point that "it would be very difficult to follow the Civil "Law with any strictness in the administration of criminal justice, "because in most offences committed against the person or pro- "perty, it considers the proceedings against the offender quite as "much in the light of an action for damages as of a criminal "prosecution for the injury done to the public." He goes on to

point out how mischievous it would be to keep to the Civil Law in this respect in such a population as that of Ceylon. 1863. Dec. 3.

This divergence from the Civil Law and adherance to the English Law in this respect has not only existed as a matter of fact, but it has repeatedly received legislative sanction in Proclamations, Charters, Ordinances, and Rules sanctioned by Ordinances, which have introduced so many regulations as to the mode of conducting criminal cases always consonant with the spirit of English Law, which regards them as matters of public interest only, and not in any way as proceedings in which one party seeks to recover something or compensation for some thing from another party. Indeed, our legislators have taken especial care to mark out the criminal proceedings, by which public justice is to be vindicated against the perpetrators of a criminal act, as a distinct thing from the civil action, in which an individual who has sustained damage from that act seeks compensation for the harm that has been done to him personally. The Ordinance for the administration of justice, No. 15 of 1843 clause 46, enacts that "neither the alleged commission of a crime or offence by any person, nor the conviction nor the acquittal of any person of a crime or offence shall be a bar to a civil action for damages against such person, at the instance of any person who may allege that he has suffered any injury from or by reason of the commission of any such crime or offence."

The law of evidence is in its nature adjective to that part of the law which declares how crimes are to be regarded. Now that we have the English Law established, which, in a criminal court, regards a crime as a matter which is to be dealt with in behalf of the public solely, it would seem on principle that we ought to adopt that part of the English Law of evidence which requires a witness to give his evidence, without payment in a criminal case, because it is a matter of public, not of private, interest; because he is bound as a matter of public duty to speak to a fact which happens to have fallen within his knowledge, for, without such testimony, the course of justice must be stopped.

We think therefore, on general principle, that the decision in this case was right, and so far as the words of the Police Court Ordinance throw light on the matter, they favour that view. The 21st clause empowers the magistrate when a case had been instituted on false, frivolous, or vexatious grounds to make the prosecutor pay the reasonable expenses of the defendant, and "of such witnesses as shall have attended at such prosecution." The words about the witnesses need not have been added here if the law supposed that the prosecutor and defendant were bound each, in the first instance, to pay his own witnesses. The words "the reasonable expenses of the defendant," would in that

1863. Dec. 3. — case have included the costs of the defendant's witnesses; and so far as regards those of the complainant, it would have been enough to leave him under his common law liability to pay them without any special order of the court. But all the words of the clause have an effective meaning or hypothesis that the witnesses have attended as a matter of public duty, and without any claim for payment on those who have subpœned them. If the prosecution has been a just and even a substantially reasonable one, the witnesses have been really doing public duty in a proceeding required by public justice. But if the case be frivolous and grossly improper, they have been brought to court under a mockery of justice, and the mischievous instigator of such a case ought to be made to re-imburse them.

The 17th section of the Rules and Orders is still more important. It gives an absolute right to either party to subpœna any witness whose evidence he thinks necessary. It imposes no condition about payment, but it does not impose a condition that the party "shall, if required so to do, have made affidavit that any person whom he desires to subpœna is a material and necessary witness." When these Rules were framed, the opposite mischiefs were borne in mind as necessary to guard against. One was the cruel injustice that would often be done to poor men, if they could not command the attendance of really necessary witnesses, the other was the mischief and vexation which we knew to be often caused by malicious persons who summoned others as witnesses, to distant Police Courts, for the mere purpose of annoyance.

The framers of the rules thought that they cured the last mentioned evil by requiring (at the Magistrate's discretion) an affidavit before a witness was subpœned; but they purposely forbore from inserting any provision for the payment of witnesses which might introduce the first mentioned evil of depriving poor men of the means of obtaining justice against criminal offenders, and also of the means of protecting themselves against false charges. It is perhaps right that we should point out that the 5th clause in the Ordinance No. 3 of 1846, does not positively enact that the English Law as to payment of witnesses shall not be the law of the Island. It merely says that it shall not be considered as introduced by that Ordinance, leaving it open to enquiry whether it or any part of it has been introduced by other measures which we think clearly to have been the case.

For these reasons, and for those given in the Court below, the judgment is affirmed.

P. C. Jaffna, No. 4,326. } *Veeravakoo* v. *Cootetamby.* 1863. Dec. 3.

In the following judgment of the Supreme Court are contained all the material facts of this case :—

Plaint—dismissal of for absence of complainant—fresh complaint—R. & O. pt. 3, sec, 13.

In this case the accused is charged with an assault. He was charged with the same offence in a former case. That case was dismissed in consequence of the complainant's absence on the day of trial, in accordance with the Rules and Orders of Police Courts, part iii, section 13, which enacts that "if upon the return of any summons or upon any day appointed for the hearing of the complaint, the complainant shall not appear and his absence shall not be sufficiently accounted for, the complaint shall be dismissed."

The question raised is, is that dismissal a bar to the second complaint, as a former acquittal or conviction would have been? The Supreme Court thinks not. The Rules and Orders themselves shew that such a dismissal is something different form a verdict of not guilty and the discharge that follows that verdict, and, on the principles that have always attached to pleas of 'autrefois acquit' and 'autrefois convict,' is no such bar. The defendant must have been in jeopardy to be entitled to plead this bar, and he cannot be in jeopardy unless he has become lawfully liable to suffer judgment for the offence charged against him; and upon a record without any judgment, no punishment can be inflicted, and a prisoner cannot be said ever to have been in jeopardy within the meaning of the rule (*Owen* v. *Drury*, 18 L. J. M. C. 192.) In that case there was a good indictment, issue well joined, a trial completely had, and a verdict found, but an erroneous judgment which was set aside, and the conviction thus deprived of one limb was held to be no bar to a second prosecution, simply because the man was not twice in jeopardy, for one and the same offence, as he could not be in jeopardy of punishment on a defective judgment.

A similar principle applies to acquittal. The case must proceed to a lawful verdict of acquittal in order to plead *autrefois acquit*, and if the proceedings stop short of that, a previous case cannot be pleaded in bar. In the case above cited, Hale's Pleas of the Crown are referred to, and Hale says "as to the second, what manner of acquittal is a good plea? It must be an acquittal upon trial either by a verdict or battle. And therefore, if A be accused and committed for felony, but no bill preferred or ignoramus found, so that at the end of the sessions he is quit by proclamation and delivered, yet he may afterwards be indicted, for he is not *legitimo modo acquitatus*." So also in this case, in order to complete the complaint, so as to make it equal to an indictment, it

1863. Dec. 3. — must be preferred on oath as an indictment is ; it is indeed not preferred openly to the court at all, but only written down in the book of the chief clerk preparatory to being fully preferred. It was no doubt on similar consideration that the Supreme Court affirmed the judgment in No. 29,045 P. C. Kandy, 94, *Lorenz,* 1856. In that case, the indictment had been fully preferred and evidence gone into, when in the middle of the case the Magistrate stopped it and discharged the prisoner. The prisoner might have perhaps claimed to be convicted or acquitted, but instead of that they claimed to treat the discharge as an acquittal, which was disallowed, not probably because an order had been granted to re-instate the case, but because the discharge did not in that case amount to an acquittal.

The order of the Police Magistrate discharging the prisoner is set aside. The Police Magistrate is ordered to proceed with the case, calling upon the accused to plead. He ought in the first instance to have called the defendant to plead over to the charge at the same time that the special plea was put in.—See *P. C. Matara,* October, 1860.

C. R. Galle, No. 25,177. } *De Silva* v. *De Silva.*

Cattle trespass—damages—proof thereof—remedy under Ordinance—or common law remedy.

The decree of the court below was set aside and judgment entered for plaintiff for the amount claimed, in the following judgment :—

In this case it is proved that 20 head of cattle broke through a fence and did damage to the amount of £99 2 3, one bullock belonged to the defendant and the plaintiff sues for £3 19 3¼ as the damage done by the defendant's bullock.

The claim was dismissed with costs upon the ground that the sum of £3 19 3¼ is loosely alleged in the plaint to represent the damage sustained by plaintiff by the trespass of this single bull, and that no sufficient proof bears this out in the evidence, and lastly that the procedure of assessment laid down in the 3rd clause of the Ordinance No. 2 of 1835, was not attended to by the headman who went to the spot.

We think this judgment ought to be set aside and judgment entered for the plaintiff for the full amount. In this action the plaintiff has proved that an injury arising from the trespass of the defendant's bullock has been done to him, and he is entitled to a judgment, though he cannot prove that the injury has cost him a farthing (see 30,033 C. R Kandy, 7th July, 1863), and is entitled

to some thing more than nominal damages. The Court below was not restricted to exactly the amount of damages sustained by the plaintiff from that one bull, for that would be placing the defendant, a wrong doer, in precisely the same footing as if the bull had entered with the plaintiff's permission, for the lowest terms upon which the defendant could have expected to obtain such permission would have been that he should make compensation for the full amount of damage that might be done, in other words, it would be putting the unlicensed trespasser upon the same footing as the one who entered with leave and license (Broom's Com. Law, p. 352), so that if we regard the plaintiff as not suing for substantial damages, the amount he asks for is so small in comparison with the whole amount of damage done that it may fairly be awarded to him as damage deemed to be reasonable in accordance with the above principle, without further calculation. On the other hand, if we regard him as suing for substantial damages, and do (in accordance with case No. 16,646, C. R. Galle, 3rd October, 1861) require him to give proof of the amount of his damage, we shall adjudge that he has proved the amount of his damage, even though he does not prove that the bull in question did eat a single plant. £99 is proved to be the damage of 20 cattle trespassing, and 1-20th of that sum to each bull is a reasonable and legal mode of computing the damage by each bull. It would be beyond all reason to ask the plaintiff to bring proof of what each bullock actually ate. Such proof is impossible and were it demanded by the law would render this common law remedy against cattle trespass a nullity and a contradiction of the maxim "ubi jus ibi remedium;" giving 1-20th to each bullock is not by rule of law supplying proof of damage, but is merely a mode of computation, the total damage being proved.

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Lastly, the court below seems to think that the plaintiff is bound by the mode of computation laid down in the Ordinance cited. That is not so; that is only a statutable mode of computation, statutable when the remedy is pursued. That Ordinance, whilst giving a more summary remedy in cases of cattle trespass, does not take away the common law right of instituting an action independently of that Ordinance (Austin's Reports p. 102, Nell's Reports, p 95, and 34,163, C. R. Colombo, 29th June, 1858) and the plaintiff having elected to abide by his common law right of action is bound only to supply the common law proof.

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P. C. Galle, No. 47,251. *Minnoe* v. *Eliasey.*

Maintenance—unmarried mother—support by her of illegitimate child—Ordinance No. 4 of 1841, cl. 3—"chargeable to and require to be supported by others"—prescription.

The finding of the court below was affirmed, as follows :—

This is a complaint for leaving children without maintenance whereby they require to be supported by others. The points of appeal are:—

1st.—That there is no proof that the children require to be supported by others, the fact being that they are supported by their mother. The children being illegitimate, we think the children being supported by the unmarried mother are, in the words of the Ordinance, "chargeable to and require to be supported by others." The only person in paragraph 2 of clause 3 are the father, his wife and his child, and all the rest of the world is included in the word "others" and as this woman is neither wife nor child, she must be one of the "others," and thus there is proof that the children require to be supported by others. The Court however does not determine in this case that if the woman were also the wife she would not be one of the "others," but leaves that question open until it arises.

2nd.—It is said that the offence is prescribed, but although it does not appear when the "leaving" took place, the children became "chargeable" within a month of the complaint, so that the act and misfeasance constituting the offence were only completed within the month, and consequently the offence was committed within the month. The offence is for leaving his children, &c. In the English Vagrant Act, the offence is defined as running away, leaving his children, &c. &c. Even under the English Act, although the words are more repugnant to such an interpretation than the words of the Ceylon Ordinance, the offence, is held not to be completed until chargeability, and that is sufficient if the information is laid within the prescription period of the chargeability, xxxi. L. J. M. C. 241, *Reeves* v. *Yates*.

3rd.—It is said the offence is not properly set out in the plaint, but it is sufficiently described for the court to ascertain the offence although the plaint is taken down carelessly by the clerk of the Police Court.

P. C. Pantura, No. 4,620. *Nona* v. *Siman.*

Maintenance—leaving wife without maintenance &c.

The following is the judgment of the Supreme Court :—

The complaint charges the defendant with leaving his lawful wife without maintenance so that she requires to be supported by others, in breach of the 3rd clause of the Ordinance No. 4 of 1841.

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The defendant was fined ten shillings and appeals upon some technical objections, but principally upon the ground that he is ready and willing that his wife shall live with him, and that he is not liable because his wife is disobedient and will not live with him. As it is urged on the other side that she cannot do so "as the defendant is living with another woman", it becomes necessary to determine if the adulterous cohabitation of the defendant with another so justifies the wife in leaving her husband's house as to render him liable under this Ordinance. The offence is not merely refusing to maintain the wife, but "leaving the wife without maintenance", so that refusing to maintain a wife that has left the husband is not punishable (10,922, P. C. Colombo, 8th May, 1848); what then amounts to *leaving* the wife without maintenance? In 19,285, P. C. Caltura, 2nd December, 1857, it has been laid down that in the event of a wife being able to prove that it was impossible for her to live in her husband's house, either in consequence of his cruelty or open adultery with another woman kept in his house, she would be entitled by law to be supported by him.

But before confirming this case by another decision, the Supreme Court took time to consider in order to find what acts in the English Law amount to such a desertion of the wife by the husband as shall entitle her to demand support from him. The cases in England occur principally in a civil form. If in England the husband separates himself from his wife or removes her from his dwelling and leaves her destitute, without being able to prove that she has forfeited her marriage rights by adultery, the law then gives her a right to support herself upon the credit and at the expense of her husband. Separating himself from his wife or removing her from his dwelling and leaving her destitute appears to the Supreme Court to be an act subject to the same rules "as leaving a wife without maintenance so that she requires to be supported by others." In the former case, if a married woman has been forcibly expelled from her home by her hnsband and threatened with violence at his hands, she has a right to charge her husband for the expense of necessary food and raiment (*Turner* v. *Rookes*, 10 A. and E. 47). So also if by cruelty or threats of personal violence or by indecent and shameless conduct, the husband renders it morally impossible for the wife to continue to cohabit and reside with him and she accordingly leaves him, this is as much an expulsion in the eye of the law as if he had turned her out by main force. If the husband bring home a loose and immoral woman and treats her as one of the family, that is a sufficient cause for the wife's leaving him; and is the existence and continuance of an adulterous intercourse on the part of a man with another woman (*Hurleston* v. *Smith*, 3 Bing. 127.) The English Courts have laid down these principles as re-

1863. Dec., 3. — sulting from those rules of morality which guide their course, and as the same rules of morality form part of the common law of this colony, the same principles as far as they can be fitted to the form of the remedy existing here are applicable here.

Accordingly, we hold that if a husband forcibly expels his wife from her house and keeps her from it by threats of violence, or if by cruelty or by threats of personal violence, or by indecent and shameful conduct, or by bringing home a loose and immoral woman and treating her as a member of his family, he renders it morally impossible for his wife to continue to cohabit and reside with him, and she accordingly leaves him and is without maintenance, so that she requires to be supported by others, we shall hold that the husband has, in the meaning of the Ordinance, left her without maintenance.

There is however in this case no legal proof of any of these things, and no reason is shown why the husband is parted from his wife, except the former case No. 4,163, from which it appears that the husband did leave the wife without maintenance so that she was supported by others. In that case, he agreed to pay three shillings a month, which was accepted ; and the first omission to pay that money would be the repetition of the offence under the Ordinance ; but in answer to this further charge, the defendant alleges, first, that he is willing and has offered to take his wife back. This is not only not an answer to the complainant if he had committed it before he offered (which appears to be the case), but if, as the wife alleges she left him under justifiable circumstances, she is not bound to go back, unless forced back by a suit for restitution of conjugal rights (*Emery* v. *Emery*, Y. & I. 505 and 506). The defendant also alleges, that the complaint is not shown to be brought within one month of the commission of the offence under the 22nd clause of the Ordinance. It is shown that no maintenance has been given for three or four months, but not when the complainant became chargeable upon others ; in fact it is not shown that the complainant has become chargeable upon others at all. Accordingly, we think the case ought to have shown the date of the offence, which it does not do, and some proof that the complainant was within time.

The case is sent back for the Magistrate to enquire into the circumstances of the desertion, the chargeability upon others, and the date of the offence.

4th December.

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Present:—CREASY, C. J., and THOMSON, J.

C. R. Kornegalle, No. 7,976. } *Oongo Naide* v. *Machlachan, &c.*

Cattle trespass—invalid license to shoot cattle—damages—circumstances mitigating damages—conduct of owner of cattle, &c.

The following is the judgment of the Supreme Court :—

The plaintiff in this case was the owner of some buffaloes in the Kurnegale District, and the defendant was then owner and occupier of a coffee estate in the same neighbourhood. The plaintiff's buffaloes were shot by the defendant's orders, while trespassing on his coffee estate.

The plaintiff sues for the loss of his buffaloes. The defendant has pleaded first "not guilty," which has rightly been decided against him, as, though he was not present when these animals were shot, it is quite clear that it was done in pursuance of directions given by him to those in his employment. He has also pleaded that the buffaloes were shot under a licence lawfully granted. This issue also has been decided against him, and the decision is affirmed, inasmuch as the licence under which the buffaloes were shot, was obtained from the District Court, which had no jurisdiction to grant it, the powers of District Courts in such matters having been taken away from them and transferred to Police Courts by Ordinance No. 5 of 1849.

Having ruled that the plaintiff was entitled to a verdict, the Commissioner proceeded to take evidence as to the value of the buffaloes, holding himself (as he says) bound to give the plaintiff the value of his animals by way of damages, and the plaintiff having deposed that his buffaloes were worth £5, the Commissioner gave him judgment for £5 accordingly.

The plaintiff was unquestionably entitled to judgment ; but whether the proper measure of damages has been given is quite another question, dealing with which we must consider a little more fully the circumstances of the case.

It appears the defendant's coffee estate is unfenced, and that it is practically impossible to fence such property, inasmuch as the cost of fencing would exceed the value of the estate. It appears that the defendant has suffered greatly by the depredations of buffaloes which generally come in, in the night time, and which it is almost impossible to catch or to identify.

It is clear that the plaintiff living in the immediate neighbourhood must have been well aware of this. Last year the defendant got a licence, in his own name, to shoot cattle trespassing on the property, but this year the license authorised the koralle to shoot, or to cause to be shot, cattle trespassing upon the premises. Al-

1863. Dec., 4. — though that license was void for the reason abovementioned, its invalidity was no fault of the defendant's, who might naturally suppose that the District Court possessed the power which it assumed to issue such documents, and throughout the case there is nothing whatever to show the least malice, oppressiveness, or moral impropriety in the defendant's conduct, though, in strictness of law, he must be held to be in the wrong. On the other hand, it is clear that the plaintiff had it in his power to prevent his buffaloes from trespassing, by keeping them tied or otherwise secured at home at night and by sending a cattle keeper to look after them, when turned out by day, He coolly states in his examination that last year, when he knew that the owner of the estate had authority to shoot cattle, he, the plaintiff, kept his cattle out of the estate, but that this year he did not know of the defendant having such authority. He adds that, on the occasion in question, he turned his buffaloes out, without a cattle keeper, in a field which runs up to the estate. We must consider that in effect the plaintiff turned his buffaloes out with the expectation and with the intent that they should trespass on his neighbour's property, relying on the nature and disposition of the animals as a security against their being caught and tied, and supposing that his neighbour had no other means of preventing the mischief which they must do to the estate.

Is a man who thus himself wilfully commits a trespass and does an illegal act under circumstances of considerable aggravation entitled to the full value of animals against the owner of the property on which they were trespassing, that owner not having in any way acted maliciously or with intentional wrong?

We do not think that such is the case. Unquestionably in ordinary cases of trespass, the *prima facie* measure of damages is to calculate the sum which would be fair money compensation for the pecuniary amount of injury done. But that rule is by no means inflexible. It is perfectly clear that in actions of tort, the misconduct of the defendant, in the circumstances of the transaction, may aggravate the amount of damages. We pointed this out recently in a case from the Court of Requests of Kandy, No. 30,033, decided here on the 7th July last. The subject will be found very fully considered in Mayne on Damages p. 12 and in other parts of that useful treatise. See too Starkie on Evidence, vol. 3 pp. 11,14, title Trespass. Now if the misconduct of one party can affect the amount of damages, it seems reasonable that the misconduct of the other party should affect it also. If the defendant is to pay more than the value of the injured article when it is proved that he has misbehaved himself, in the circumstances connected with the injury, surely proof of an opposite character ought to have an opposite effect. The plaintiff's

misconduct ought to mitigate, as much as the defendant's ought to increase, the damages. Nor are authorities wanting on the point, though they are not so nnmerous as on the converse of the proposition. 1863. Dec., 4.

There is the well known case of *Du Bort* v. *Beresford*, 2 Camp. 511, in which the defendant had destroyed a picture which was a scandalous libel on his sister. Lord Elenborough there only allowed damages to be given for the value of the canvas and the paint.

In *Morris* v. *Nugent*, 7 C. P., 572, the plaintiff sued the defendant for the value of a dog which the defendant had shot. Lord Denman sanctioned a verdict for a shilling damages only, in consideration of the plaintiff having suffered his dog, which was known to be of ferocious character, to be at large. In *Thomas* v. *Powell*, p. 807 of the same volume, the annoying and offensive couduct of the plaintiff was allowed by Baron Park to be proved in mitigation of damages, in an action of false imprisonment. In *Prothers* v. *Mathews*, 5 C. P. 581, it was considered a good answer to a claim for shooting a dog, that the dog was chasing deer in a park. In *Wells* v. *Head*, 4 C. P. 568, also a case for shooting a dog, it appeared that the dog had been worrying defendants sheep, but that it had left them and gone to another close before it was shot. Mr. Justice Alderson told the jury that, though there "could not "be a verdict for the defendant, the habits of the dog might be "considered in mitigation of damages," and a verdict passed for one farthing. The only cases which appear to have a contrary import are *Vere* v. *Lord Camden*, 11, East, 568, and one in 8 Meeson and Welsby. In *Vere* v. *Lord Camden*, a plea that a dog was shot while running after hares was held bad on demurrer; but the Court never said that such facts might be proved in mitigation of damages, and great stress was laid on the fact that hares are not subjects of property. In *Gillard* v. *Brittan*, 8 M and W. 578, where the vendor of goods was sued in trespass for having illegally taken the goods away from the purchaser, the defendant was not allowed to prove that the goods had not been paid for, and the plaintiff had a verdict for the full valne of the goods. But we must mark well the principle of that decision. Baron Elderson says that the evidence was excluded because to admit it would have been "equivalent to allowing a set-off in trespass." We all know that by English Law that cannot be done. But we also all know that, by the law of this Colony, a claim by way of reconvention is allowable in such an action. And the defendant might, in this very case, have claimed, by way of reconvention, damages from the plaintiff, for the trespass done by the buffaloes to the coffee estate.

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We hold that, both on authority and principle, we are justified in taking into our consideration all the surrounding circumstances of the case, and in ascertaining whether the damages ought to be either aggravated or mitigated by them. We find no matter for aggravation and much, very much, for mitigation. We accordingly reduce the damages from £5 to 5*s*.

In giving this judgment we are anxious that it should not be misunderstood as sanctioning the destruction of valuable property, or of any property, on slight provocation or for trifling breaches of law. In such cases, and especially if there is cause to believe that the person destroying animals does so in reality out of spite, and merely uses the trespass as a colourable protest, he ought not to have one jot of the ordinary amount of damages abated in his favor, and may indeed be liable to have them considerably enhanced. Every case must be judged according to its own circumstances, and, under the circumstances of the present case, we direct the judgment for the plaintiff to stand, but the amount to be reduced to five shillings.

D. C. Badulla, No. 16,030. *Ukko* v. *Tambya*.

Husband and wife—desertion by husband—action for maintenance—adultery of wife—evidence.

On defendant's appeal the following judgment was delivered by the Supreme Court,—

This is a suit by a Kandyan woman, married to a Kandyan (the Marriage having been registered under the Kandyan Marriage Ordinance), for maintenance, the wife alleging that the husband deserted her.

The husband admits that his wife was legally married to him in *deega*, and denies the desertion. The Court below found the desertion ; but it is now objected that the marriage having been effected and registered under the Kandyan Marriage Ordinance, the wife cannot sue the husband and that the Judge ought to have admitted evidence preferred of the wife's adulterous conduct, which would have relieved the husband from the duty of maintaining his wife.

In reference to the first point, it is unnecessary to make inquiry, as even in the Maritime Provinces, the wife can sue her husband for her maintenance, if she has acquired a legal right to that maintenance by the act of her husband. No. 839, Galle, 11th September, 1835. See also Marshall, pp. 160, 161, 218, 219, and the Kandyan Marriage Ordinance in no way affects that position. In the case cited, the husband and wife had separated by consent

and the wife sued upon a bond given her husband; still more will the wife have the right to sue when he has separated from her of his own wrong, and rendered himself legally liable to provide her with separate maintenance.

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But we think, that a wife in Ceylon, would only have a right to sue her husband for maintenance, where in England she would have a right to pledge his credit ; and on the same grounds of morality which have been applied in this colony to cases of criminal misconduct, the husband by the marriage contract takes upon himself the duty of supporting and maintaining his wife so long only as she remains faithful to her marriage vow. Women who violate their vow have no longer any claim upon the husband (except under settlement), and the previous adultery and misconduct of the husband forms no excuse in point of law for the adultery of the wife (*Govier* v. *Hancock*, 6. T. R., 603.)

The wife's adultery, whether before or after desertion, is therefore a proper subject of enquiry in a suit for maintenance.

The judgment is set aside, and the case sent back for further hearing, to receive evidence as to the wife's conduct ; if she committed adultery before the desertion, she will be entitled to nothing, but if she committed adultery after desertion she will be entitled only to such arrears of maintenance as arose between the desertion of the husband and her adultery. The husband is entitled to give this evidence under that part of his second plea which denies the debt.

Regina v. *Aronasalem Kangani.*

False pretences—theft—cheating—*stellionatus*—Roman Dutch law—law of Ceylon unstamped money order—property.

The following was the case stated by the Chief Justice for the consideration of the Collective Court :—

" The prisoner was tried and convicted before me at the second session for 1863 held at Kandy for the District of Kandy on the Midland Circuit. The material parts of the indictment are as follows :—in one count, the prisoner was charged that he on &c. unlawfully, knowingly and designedly did falsely pretend to one Frederick Cooper, that he, the said Aronasalem Kangani then had twenty coolies employed under him as their kangani at the Hatbawe coffee estate, and that he was able and ready to bring twenty coolies to the said Frederick Cooper to work under him at the Kaduganawa estate of which the said Frederick Cooper was in charge. By means of which false pretences the said Aronasalem kangani did unlawfully obtain from the said Frederick Cooper a certain order for the payment of £10 with intent thereby to defraud.

" The indictment then negatived the truth of the pretences in the usual manner.

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" Other false pretences were laid, but as it appeared from the evidence that they were rather promises as to the future than false assertions as to past or present facts, they and the evidence respecting them were withdrawn from the consideration of the jury, so far as regarded the count for obtaining by false pretences.

" The indictment also contained two common counts for theft. In one of them the prisoner was charged that he did unlawfully steal, take, and carry away a sum of money amounting to £10, the property of one Frederick Cooper, or of one Velayappa Chetty. In the other count, the prisoner was charged that he did unlawfully steal, take, and carry away a certain order for the payment of £10 the property of Frederick Cooper.

" It was proved that the prisoner was a kangani on the Hatbawe estate, and that on the 1st May last he came to Mr. Cooper, the superintendent of the Kaduganawa estate, and represented to him that he, the prisoner, had then 20 coolies under him, and that he could bring them to work on the Kaduganawa estate by the 10th of that month. He asked for an advance of £10 in respect of his bringing these 20 coolies. On the faith of what he said, as to having 20 coolies under him and being able to bring them to Kaduganawa, Mr. Cooper gave him an order for £10 on Velayappa Chetty, who supplied the Kaduganawa estate with rice. The order had been destroyed before the trial, but according to Mr. Cooper's memory, the form was as follows : " Velayappa Chetty please pay the bearer the sum of ten Pounds, Frederick Cooper." It was unstamped. Valayappa Chetty had no money of Mr. Cooper's in his hands at that time. The prisoner took the order to Valayappa Chetty, and obtained the money for it. The account was debited by Velayappa Chetty to Mr. Cooper and was afterwards paid by Mr. Cooper to Velayappa Chetty on a settlement of accounts between them.

" With regard to the prisoner having 20 coolies under him and being able to bring them to work on the Kaduganawa estate, as he promised to do, it was proved that at the time of his conversation with Mr. Cooper he was a kangani on the Hatbawe estate, and had only four coolies under him and had not had any more under him for a long time previously. He had formerly, when employed on the Hatbawe estate, had from 20 to 25 coolies under him, but when he came last to the Hatbawe estate he brought only four coolies with him, and had had those four only down to and at the time when he got the money order from Mr. Cooper. It was further proved that within four days from the time he told Mr. Cooper that he had 20 coolies, and when he got the £10 he (the prisoner) had told another who was negociating with him respecting coolies that he (the prisoner) had no more than four coolies, and that if he

was wanted to bring more, he must receive money to give to his brother-in-law to go to the coast and hire them with.

The prisoner did not go to the Kaduganawa estate, or to Mr. Cooper with the 20 coolies, or with any coolies as agreed, nor did he go to the Kaduganawa estate at all ; nor did he repay the money or any part of it, nor did he communicate in any way with Mr. Cooper before his apprehension under a warrant issued on the 27th May. But within four days of the time when the prisoner got the money order from Mr. Cooper, he went with his four coolies to another, the Morogalle, estate, where he engaged himself and his coolies to work. He did not tell the people on the Morogalle estate, with whom he engaged, anything of the transaction with Mr. Cooper, and he prevailed on the Morogalle people to make some payments for sums due by him (the prisoner) and his four coolies on the Hatbawe estate, so as to enable them to leave it.

In summing up the case to the jury, as to the false pretences count, I directed them that they should find a verdict of guilty if they were satisfied, 1st that the prisoner represented to Mr. Cooper that he (the prisoner) then had 20 coolies under him ; and 2nd that, that representation was false ; and 3rd, that it was by means of that false representation that he obtained the money order from the prosecutor (Mr. Cooper); and 4th, that the prisoner intended to defraud.

I directed them that, if they were not satisfied as to the affirmation of all and each of these four questions, to find the prisoner not guilty in the false pretence count.

On the counts for theft, I recommended the jury to return a verdict of guilty, if they were satisfied that the prisoner acted throughout fraudulently in the transaction, that he obtained the property with the deliberate intention of getting it from the owner, and fraudulently appropriating it by means of wilful lies, and not with any honest, though mistaken, belief that he (the prisoner) could do what he alleged.

I directed the jury that unless they were so satisfied, they should return a verdict of not guilty in the count for theft.

The jury returned a verdict of guilty generally, and in answer to a question put by me, they stated that they were satisfied in the affirmative on all of the four questions put specially by me for their consideration, when directing their attention more particularly to the count for false pretences.

Having some doubt as to the law of the case, I did not pass sentence, but ordered the prisoner to give bail to appear at the next session to receive judgment.

The points reserved by me for the consideration of the Collective Court are :—

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1. Is the conviction on the count for false pretences sustainable according to the law of this colony ?

2. On the facts and finding of the jury as here stated, was the prisoner rightly convicted of theft on both or either of the last counts ?

3. Was any offence punishable under any of the counts of this indictment proved, having regard to the nature and form of the money order, the fact of its being unstamped, and the other facts connected with it.

The judgment of the Collective Court was as follows :—

We think that the conviction in this case, on the count of obtaining by false pretences, is right, but that the conviction on the count for theft is erroneous. It has been argued before us on behalf of the Crown, that all cases of obtaining by false pretences are theft according to the Roman Dutch Law. We are referred to Voet's commentary on the 47th book of the Digest, tit ii, 6, who certainly mentions some cases of cheats and false pretences as amounting to theft ; among which is cheating by the use of false weights and measures. But it is abundantly clear that the Roman Law did not consider all cases of obtaining property by cheating and fraud to be theft. A very great number of such cases are mentioned in the Digest, and in the Roman Dutch Law books, as not amounting to theft, but as constituting the criminal offence which the civilians called "*stellionatus*," a word which the translator of Vander Linden (Inst. p. 346) seems to render as "falsity," and which certainly includes all cases which would fall under either the English Common Law as to cheating, or the English Statute Law as to false pretences. For instance in the Digest 47, 2, 20 we read "cum aes pignori fit datur, etiam si aurum esse dicitur turpiter fit, furtum non fit." The commentator in the large Dutch annotated edition of the Corpus Juris Civilis, p. 1147, writes on this, "turpiter fit, unde stellionatus crimine tenetur." Indeed the civilians in general (though not without exception) lay down, as strictly as English lawyers, that in order to constitute theft, the taking must be "invito domino." Thus in the edition of the Corpus Juris already alluded to, the commentator upon the words of the Digest, which state that "furtum est contrectatio rei fraudulosa", adds "domino invito subaudi." Damhouder in his Praxis Rerum Criminalium, p. 185, gives three definitions : "est furtum alicui clam, occulte et sine armis sua eripere : vel "furtum est alterius bona mobilia vel usum eorum contra possess- "oris consensum animo furandi fraudulose auferre. Aut (si mavis "jurisperitorum definitionem) furtum est contrectatio fraudulosa "rei alienae mobilis corporalis vel etiam usus ejus possessionisve,

"quae fit animo lucri faciendi invito domino." It is remarkable that Damhouder at p. 189 makes cheating by false weights and measures an offence distinct from theft; he call it, "falsitas p abusum." Vander Linden, in the part of his Institutes already r ferred to, deals with falsity as an offence distinct from theft; a in his definition of theft, at p. 343, he expressly terms it a takin against the will of the owner. 1868. Dec. 4.

One of the most remarkable passages as to what does, and what does not, constitute theft, is in the Digest itself, and indicates a view of what might have been taken of the present case, a view which was mentioned by one of the judges of the Supreme Court during the argument, but which did not occur at the time of the trial to the judge who presided and on which he omitted to take the opinion of the jury. The passage is book 47, tit. 2, 44. "Falsus procurator furtum quidem facere videtur, "sed Neratius videndum esse ait an haec sententia cum distinctione "vera sit, ut, si hac mente ei dederit nummos debitor, ut eos cre- "ditori perferret, procurator autem eos intercipiat, vera sit; nam "et manent nummi debitoris, cum procurator eos non ejus nomine "accepit, cujus eos debitor fieri vult, et invito domino eos contrec- "tando sine dubio furtum facit. Quod si ita det debitor, ut nummi "procuratoris fiant, nullo modo eum furtum facere ait, voluntate "domini eos accipiendo."

Had the jury in this case been especially questioned it is probable that they would have found that the prosecutor gave the money order to the prisoner, not for him to treat it as absolutely his own, and to do what he liked with it, but with the specific purpose that it, or part of its proceeds, should be employed in paying off the arrears of the supposed coolies at the other estate, and in bringing them to the prosecutor. Had the jury found this to have been the case, and that the prisoner appropriated the money in contravention of that purpose, there would have been much to argue on in this case in support of the offence amounting to theft. We, however, give no express opinion in this matter, which is not now fully before us. As these proceedings stand, we think that the conviction on the count for theft erroneous.

But the facts of the case clearly show, and the frame of the 1st count of the indictment sufficiently charges, the commission of the offence of "cheating," the best and simplest word into which we can English the old law Latin term "stellionatus." We have carefully ascertained that the old law as to "stellionatus" had not become obsolete in Holland at the date which we have to regard in these matters. Vander Linden proves that the law still existed in his time; we have also examined *Groenewegen de Legibus Abrogatis* and the *Decisiones Belgicae* of Christinæus. There had

1863. Dec. 4. been a change in the law as to the punishment, not as to the crime.

We know too that in practice it has been dealt with as a criminal offence in our courts. Indictments like the one before us have long been in use. They are based, not on any Ordinance, such as the English Statute against false pretences, though they are generally (and prudently) drawn on the model of English precedents. They are based on the old Roman Dutch Law against cheating ; that law has also always been, (and we hope always will be) administered here, subject to the same wise restrictions which are maintained by the English judges, as to what kind of cheats and false pretences are criminally punishable.

Another point reserved in this case was whether the unstamped money-order which the prisoner obtained from the prosecutor was property in respect of which either theft or cheating would be committed so as to make the offender criminally punishable. The document taken here was certainly a bill of exchange. Our Stamp Ordinance, No. 11 of 1861, requires such a document to be stamped. It is true that the sixth section permits it to be received as evidence in criminal proceedings, though it may be unstamped ; but this would not cure the difficulty which is not whether the unstamped document can be read in evidence, but whether it is not an illegal instrument, having no legal value, and therefore out of the protection of the criminal law. The English decision of *R.* v. *Yates*, R. and M., C. C. page 170, appears at first sight to support this objection ; but, on consideration, we do not think that it ought to prevail. Bills of exchange and similar instruments, even if properly stamped, are not subjects of larceny, according to the English common law, which denies that quality to choses in action, and in this respect the English law, to false pretences follows the law of larceny. These instruments are made the subjects of larceny in England by special statutes, which speak of them as " valuable securities," and the English Courts have held that unstamped bills are not valuable securities. But our common law as to theft and cheating knows no such requirements in this respect. A bill of exchange is here looked on as property just as much as any other chattel is. A stamp ordinance may for revenue purposes require such a document to bear a stamp, but the theft of it is not the less a theft because that provision in favor of the revenue has not been complied with. The case is the same, if it is obtained by cheating. The English decisions that forgery is punishable though the forged document be an untamped bill or note strongly apply here.

In affirming this conviction on the count for cheating, and quashing it on the count for theft, we think it may be well to add our recommendation that the practice which has long existed, as to informations of this kind, of inserting counts for cheating (accord-

ing to the English false pretences precedents,) and also counts for theft should still be followed. The boundaries between theft and cheating are often so wavering and so slightly defined that it is impossible to say with certainty, till all the evidence at the trial has been heard and considered, under which class the particular case ought to be ranked. If the indictment be for theft only, the offence may be held to be not theft but cheating, and the offender so escape. The converse may take place, if the indictment is ouly for cheating. By adhering to the common form, no harm is done to any one, and substantial justice is assured.

The judgment of the court is, that the conviction be affirmed on the first count of the information ; and that the conviction on the other counts be quashed; and that judgment be given, and sentence be passed against the said Arnasalem kangani on the first count of the information according to law.

5th December.

Present :—THOMSON, J.

P. C. Jaffna, No. 4,716. } *Trydell* v. *Morogaser &c.*

Practice—necessity of summons.

The accused were charged with theft for stealing and being in possession of a spoon the property of the complainant. They pleaded not guilty, and the Police Magistrate after hearing evidence found the second and fourth accused guilty and acquitted the other two accused. The fourth accused appealed against the conviction on the ground that no summons was served on him, but that he was taken up by surprise and made an accused in the case. The Supreme Court affirmed the judgment of the court below in these terms :—

It is laid down in 67,670 Police Court Colombo, 7th July 1863, that the want of a summons may not be fatal when it is clear that the defendant has come before the court without a summons but that he also stood there with as full advantage for his defence as he could have enjoyed if a summons had been served upon him. In the case before us the defendant was before the court, he was regularly charged, pleaded not guilty, and said he was ready to go on : he had an opportunity of cross examination given him, and called his witnesses. Under these circumstances, the Supreme Court thinks the proceedings regular and affirms the case.

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22nd December.

Present :—THOMSON, J.

P. C. Mallakam, No. 6,793. *Canapathy* v. *Suppayer*, et al.

False prosecution—adjudication—expenses of defendant.

The following is the judgment of the Supreme Court :—

There ought to be au express adjudication on the face of the proceedings that the prosecution was instituted on false, frivolous or vexatious grounds, as the case may be (41,179 Galle B. and V., P. C. Report 159), that is, it ought to appear that the complainant has been charged with bringing a false and frivolous charge, and that he has been called upou to shew cause why he should not be fined (4705 P. C. Harrispatto, 3rd March, 1863.) The complainant may in perfect faith and honesty and without any malice institute an erroneous charge aud may be able, and certainly should have the opportunity of shewing this, either by being called upon to plead to the charge, or upon a rule charging him with a false and frivolous charge and calling upon him to shew cause why he should not be fined, and lastly it should in all cases be the subject of a separate judgment. Neither can the expenses of the defendant be adjudged to him without some evidence as to what the defendant's expences really are. It is not in the bare discretion of the magistrate to award such expenses as he thinks applicable.

In the case before the Supreme Court, the complainant has not been charged with bringing any false and frivolous case, nor has he been called upon to shew cause why he should not be fined for the same, and no evidence has been taken as to the defendant's expenses in answering the charge.

In sending back the case, the Supreme Court points out to the Police Magistrate that it is still in his power to have the complainant placed before him for bringing a false and frivolous complaint and to try him for that offence either by a separate charge or by calling upon him to show cause (as is done in case of contempt) and also to take evidence as to the defendant's expenses, for the proceedings as to that fine and those expences being quashed by this reversal, it is the same as if the complainant had never been in jeopardy of that fine or liable to pay those expenses.

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13th January.

Present :—CREASY, C. J., TEMPLE, J., and THOMSON, J.

D. C. Colombo, No. 18,151. } *Queen* v. *Capper*.

Courts Martial—publication of proceedings thereof—disobedience and contempt—obstruction of public justice—prosecution before District Court—its jurisdiction—right of Queen's Advocate to to limit punishment—defective indictment.

The defendant in this case, who was the editor and proprietor of the newspaper, called the *Ceylon Times*, was charged in the indictment (appearing below) with having, in disobedience of an order and prohibition of a General Court Martial, duly constituted and convened at Colombo on the 26th October 1863, for the trial of one O'Brien, Brevet Major, unlawfully, wilfully, contrary to the said order and probibition, and in contempt thereof and of the said General Court Martial, and to the obstruction of public justice, printed and published the proceedings of the said Court Martial, in certain issues of the newspaper called the *Ceylon Times*.

The indictment ran as follows :—

"The Hon'ble Richard Francis Morgan, Esquire, Advocate of our Sovereign Lady Queen Victoria, informs this Court, that at a General Court Martial duly constituted and convened at Colombo on the 26th day of October 1863, under and by virtue of the Act 26 Victoria, Chapter 8 (passed 20th April 1863) by order of the Hon'ble Major General Terence O'Brien, the Commander of Her Majesty's Forces in this Island, and duly authorized and empowered to convene Courts Martial for the trial of Brevet Major John Terence Nicolls O'Brien, whereof Colonel William Twistleton Layard was president, it was publicly announced on the said 26th day of October at the sitting of the said Court, by the said president in conformity with the order of the said Court, the said Court having competent authority to make such order, that the said Court forbade the publication of the proceedings until after the termination of the trial, of which said order and publication John Capper (who was then present) had notice and was well aware. Novertheless the said John Capper, afterwards to wit, on the 6th day of Nevember in the year aforesaid, at Colombo aforesaid, said trial being still in progess, and not having terminated, unlawfully, wilfully, contrary to the said order and prohibition, and in contempt thereof, and of the said General Court Martial and to the obstruction of public justice, did in a certain newspaper entitled "The Ceylon Times" (whereof he was the editor and proprietor,) dated the said 6th

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day of November, print and publish the proceedings of the said Court Martial, to wit, among other things the charges against the said Brevet Major John Terence Nicolls O'Brien, the evidence of the Hon'ble William Charles Gibson, the Colonial Secretary of this Island, the evidence of Frederick Maingay, the evidence of Naylor Dunbar Schultze, the evidence given on the 4th day of November, 1863, by Henry Ashmore Evatt, Assistant Commissioner of Roads; the said William Charles Gibson, Frederick Maingay, Naylor Dunbar Schultze and Henry Ashmore Evatt, having been examined as witnesses and given evidence before the said Court Martial.

"And the said Advocate further informs this Court, that heretofore, to wit, at a General Court Martial duly constituted and convened at Colombo, on the 26th day of October, in the year 1863, under and by virtue of the Act 26 Victoria, Chapter 8 (passed 20th April 1863) by order of the Hon'ble Major General Terence O'Brien, the Commander of Her Majesty's Forces in this Island, and duly authorized and empowered to convene Courts Martial, for the trial of Brevet Major John Terence Nicolls O'Brien, whereof Colonel William Twistleton Layard was president, it was publicly announced on the said 26th day of October at the sitting of the said court by the said president in conformity with the order of the Court, the said Court having authority to make such order, that the said Court forbade the publication of the proceedings until after the termination of the trial, of which said order and prohibition John Capper (who was then present) had notice and was well aware. Nevertheless the said John Capper afterwards to wit, on the 10th day of November in the year aforesaid at Colombo aforesaid, the said trial being still in progress and not having terminated, unlawfully, wilfully, contrary to the said order and prohibition and in contempt thereof and of the said General Court Martial and to the obstruction of public justice did in a certain Newspaper, entitled *The Ceylon Times*, (whereof he the said John Capper was then and still is the editor and proprietor), dated the 10th day of November, print and publish among other things, one of the charges against the said Brevet Major John Terence Nicolls O'Brien, and in substance and to the effect as follows: "For "having written a letter animadverting upon the conduct of the "Ceylon Government. Such conduct being &c."

And the said Advocate further informs this Court that heretofore, to wit, at a General Court Martial duly constituted and convened at Colombo on the 26th day of October in the year 1863 under and by virtue of the Act 26 Victoria Chapter 8 (passed 20th April 1863) by order of the Hon'ble Major General O'Brien, the commander of Her Majesty's Forces in this Island, and duly authorized and empowered to convene Court Martial, for the trial

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of Brevet Major John Terence Nicolls O'Brien, whereof Colonel William Twistleton Layard was president, it was publicly announced on the said 26th day of October at the sitting of the said Court by the president in conformity with the order of the said Court, the said Court having competent authority to make such order, that the said Court forbade the publication of the said proceedings until after the termination of the trial of which said order, and prohibition John Capper (who was then present) had notice and was well aware. Nevertheless the said John Capper afterwards to wit on the 13th day of November in the year aforesaid at Colombo aforesaid, the said trial being still in progress and not having terminated, unlawfully, wilfully, contrary to the said order and prohibition and in contempt thereof and of the said General Court Martial did in a certain newspaper entitled "The Ceylon Times" (whereof he the said John Capper was then and still is the editor and proprietor) dated the said 13th day of November print and publish the proceedings of the said Court Martial, of the 6th, 7th, 9th, 10th and 11th day of the said month of November, to wit, among other things the evidence of Corporal Burgareet Singh, of Omar, otherwise called Gardeme Omar, of Anoka Singh, and Moosach Singh, in substance and to the purport following, that is to say : [and the indictment after setting out the evidence, concluded in the usual manner.]

The accused pleaded not guilty.

The learned District Judge found that the averments in the indictment contained were clearly proved, but was of opinion that, had a contempt of the Court Martial been committed, the proper remedy was by attachment and interrogatories, and not by indictment or information ; also that the order prohibiting publication was in itself illegal, and that the publication was not to the obstruction of public justice. In the course of the judgment, the following authorities were cited. *King* v. *Clement*, 4 B & A, p. 218 ; Hough on Courts Martial, pp. 446—451 ; Jurist, 1848, p. 529.

On appeal, the *Queen's Advocate* appeared for complainant appellant, *Dias* for defendant respondent.

The Supreme Court quashed the proceedings and discharged the defendant, observing as follows :—

We do not feel it necessary to adjudicate here on the very important questions as to the powers of Courts Martial, which have been raised before us. We are clearly of opinion that this prosecution cannot be sustained, for reasons unconnected with those questions.

In the first place, these proceedings, if taken at all, ought not to have been taken in the District Court. The District Court has

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only a limited jurisdiction in criminal matters; and the bounds of its jurisdiction are marked out by the 25th clause of the Charter and by the Ordinance No. 5 of 1846. We are of opinion that the District Court has no criminal jurisdiction (unless expressly given by some special enactment) in a case where the offence charged is punishable by fine exceeding £20; and we also consider it certain that the offence of insulting a court and obstructing the administration of justice under circumstances such as are alleged against this defendant, is an offence punishable by a higher fine than the limited sum of £20. We do not mean that it must necessarily in all cases be punished by a higher fine, but that such a case, in the absence of any special reasons for mitigation, would, in the ordinary exercise of judicial discretion, be visited by a higher penalty. We are not saying this merely from our opinion of the proper kind and proper scale of punishment in such cases, (though we have carefully discussed the subject, and are fully agreed upon it), but we have also the authority of the closely similar case of *The King* v. *Clement*, 4 B. & Ald. 218, where a fine of £500 was imposed. It is no answer to this objection to the present proceedings to say that imprisonment might have been inflicted. The Court that tries such a case ought to have the power of imposing the proper amount of the proper kind of punishment, and not to be left to eke out the full measure by imposing what it may well consider to be punishment of a character inappropriate for the occasion. There is a decision of this court in No. 1308, D. C. Batticaloa, 7th September, 1855, in which this principle is clearly established, and in which it also demonstrated that the *Queen's Advocate* cannot have the right to limit the punishment with which an offence is to be visited, by trying the offender before a court that is incompetent to pronounce a full sentence. It is always to be remembered that not only is it necessary to try such offences before the proper tribunals, in order that the proper amount of punishment may be inflicted on the guilty, but that it is even more important for the sake of an innocent man who may be thus accused. If Mr. Capper had been tried on this charge before the Supreme Court, he would have had the benefit of trial by jury. By trying him in the District Court he is deprived of that privilege.

We are also of opinion that all the counts of this information are substantially defective and bad. Not one of them avers, with sufficient distinctness, the making of the order, which the defendant is indicted for disobeying. They state that the president, in conformity with an order of the court, announced that an order prohibiting publication had been made. This is capable of merely meaning that the president was directed by the court to make the

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announcement, and cannot in law be taken as equivalent to a statement of an order prohibiting publication having been made. See the case of *R.* v. *Crowhurst* 2 Ld. Raym, 1,862, where an indictment for disobeying an order of justices was held bad, because it did not state explicitly that the order was made, but only set it out by way of recital.

We decree and adjudge that the proceedings against the defendant be quashed, and that he be discharged.

C. R. Caltura, No. 17,112. } *Perera* v. *Fernando.*

Use and occupation—Ordinance No. 7 of 1840, section 2—evidence.

The following is the judgment of the Supreme Court :—

This was a suit for £9 10s. for use and occupation; the defendant denies the liability and pleads payment. The question was whether the plaintiff could recover for use and occupation under a parol lease after the Ordinance No. 7 of 1840, section 2.

That section enacts that " no bargain, contract, or agreement for establishing any security, interest or incumbrance effecting land or other immoveable property (other than a lease at will, or for any period not exceeding one month) shall be of force or avail in law unless notarially executed."

After this Ordinance there are only a few decisions as to use and occupation, (7219 C. R. Matara, 24th July, 1863 ; 3931 Bentotte, 220 Nell ; 8420 Galle, 239 Nell;) and in those, that subject is mentioned only incidentally. One decision is No. 7219, C. R. Matara, which runs thus : " A suit on a verbal lease for 10 months is contrary to the Ordinance of Frauds and Perjuries. It is open however for the plaintiff to sue for use and occupation,"—the court not regarding this as an express decision on the point, and observing that the English Statute of Frauds is differently worded and has a different legal effect from the Ordinance of Frauds and Perjuries.

The action for use and occupation has obtained in England, notwithstanding the 4th section of the Statute of Frauds. That section runs thus : " No action shall be brought upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them, unless the agreement upon which such action shall be brought or some memorandum, or note thereof, shall be in writing and signed by the party to be charged therewith or some other by him thereunto lawfully authorized."

After the passing of this statute it soon became to be explained that the Statute of Frauds is not applicable to any case where the action is brought on an *executed consideration,* for as the object of the legislature clearly was to prevent the setting up, by means of fraud and perjury, of contracts or promises by parol,

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Taylor in his work on Evideuce further says (§. 954) "the only relaxation of the statute which the courts of law will allow amount to these ; first, if a parol agreement respecting lauds has been *entirely executed* by both parties, the contract cannot afterwards be called into question, should it be necessary to refer to it for any collateral purpose ; and next, if it has been *executed by one party*, and the transactions be of such a nature as to admit of an action for use and occupation or in *indebitatus assumpsit*, the other party, perhaps, will not be permitted to defeat this action by setting up the statute.

"For instance, though the performance of a verbal contract to take furnished lodgings so long as it remains executory cannot be enforced, yet, if possession under it is taken by the tenant, it may then be supported by the landlord, either as a valid lease for three years, under the 2nd section of the Act, or at least as affording evidence of the terms of such lease. But the courts of Common Law will go no further, and therefore if an action be brought *upon the contract itself*, the mere fact that the plaintiff has performed his part of the agreement will not entitle him to recover against the defendant who has omitted to perform his part."

So also in the Courts of Equity, parol agreements are enforced if they have been performed in some material part. As for instance, if possession has been distinctly taken under them and rent paid or the like, but even in those courts such agreements will not be excluded from the operation of the statute by any part performance which does not place the acting party in such a position that it would be a fraud upon him if the contract were not completed (see p. 852 *Taylor on Evidence*, edition 3rd).

Thus if the Ceylon Ordinance, were entirely the same as the English Act, the court would at once adopt the principle, that use and occupation could be sued for ; but the two statutes differ.

For whereas the English Act provides that *no action shall be brought* upon such parol agreements, the Ceylon Ordinance makes such to be of no force or avail in law.

Now, there are two ways of considering these words. They are strong indeed, and may have the strongest meaning ; they may either mean that the agreement is to be invalid for want of a proper deed to satisfy the statute, that is, they shall, like an incorporeal hereditament or a contract by a corporatiou, be evidenced by a deed to be of force or avail in law ; or they may mean (and

they are open to such a meaning,) that such contracts are absolutely illegal for all purposes, in the same manner that contracts founded on immoral considerations are illegal and which cannot be sued upon, whether *executory or executed*; as the words literally may bear either construction we must look at the spirit of the Ordinance. The Ordinance is to prevent fraud—and if we put the latter meaning upon it, we shall not prevent fraud, but make the Ordinance the very instrument of fraud itself. Where there is a doubt in the construction of a statute, the courts lean to that which will exclude the possibility of fraud. We have seen that the Court of Chancery only loosened the English Act so as to prevent that court from being the means of assisting fraud. Parol executory contracts are dangerous, and as to them the statute ought to be strictly interpreted; but in parol executed contracts the actual execution of the contract can be accurately proved, and to exclude them would work injustice.

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The Supreme Court therefore takes it that a contract like the present is simply invalid under the statute, for want of a notarially executed deed and that it is not tinged with illegality, and that accordingly it must be treated as incorporeal hereditament not evidenced by deed, and contracts with corporations have been treated which contracts are held in England to be invalid, but not tinged with illegality. As the first, although it is laid down that a parol demise of an incorporeal hereditament passes no estate, it by on means follows that the party who actually occupied and enjoyed the thing so demised is protected form all liability to pay for his occupation and enjoyment; and the grantor will still be entitled to recover from the grantee account for use and occupation such reasonable sum as a jury shall assess for the actual enjoyment of the hereditament demised. See *Taylor* 893; and *Bird* v. *Higginson,* 2 A. & E. 705; etiam 6 A. & E. 824; 4 N. & M. 506; and *Thomas* v. *Fredericks,* 10 Q. B. 775. So also in suits on those contracts with corporations which are required to be by deed. For example, a corporation, after receiving goods ordered by its servants refuses to pay for them on the technical pretext, that no contract under seal has been executed, To prevent so gross an injustice, the courts have held that it does not lie in the mouth of the corporation to say that the contract was not by deed, inasmuch as the work in question, after it was completed, had been adopted by them for purposes connected with the corporation.

Sanders v. *St. Neots Union,* 8 Q. B. 810.

Beverly v. *Lincoln Gaslight Co.,* 6 A. & E. 829.

De Grave v. *Mayor of Monmouth,* 4 C. & P. 111, Per *Ld. Tenterden.*

Raling v. *London and N. W. Railway,* 23 L. J. Ex. 8 Ex. R. 867 S. C.

1864. Jany., 13. — Where the corporation have acted upon an *executed* contract, it is presumed against them that everything has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made. This is not inconsistent with the rule that a corporation can only contract by deed, it is merely raising a presumption against them from their acts that they have contracted in such a manner as to be binding upon them whether by deed or otherwise.

Doe v. *Taniere*, 12 Q. B., 1013, 1014.
Reuter v. *Electric Telegraph Co.*, 6 E. & B. 341.
Henderson v. *Australian Steam Co.*, 5 E. & B. 409.
Australian Steam Co., v.—11 Ex. R. 228.
Homersham v. *Wolverhampton*, 6 Ex. R. 137.
Sanders v. *St. Neots*, 8 Q. B. 810.
Permington v. *Tanier*, 12. Q. B. 1013.
De Grave v. *Monmouth*, 4 C. & P. 111.

On a similar principle it is laid down that an officer, (as a mayor of a town) *de facto* binds an executed consideration as if an officer *de jure*.

Similar also are the cases where a party holds over, after the expiration of a lease.

All these cases resting on the principle, that where there is no legal obligation to do a future thing, yet if one has in fact enjoyed all the advantages of an agreement, that forms a moral obligation sufficient to support a promise notwithstanding the statute. (See *Seaman* v. *Price*, 2 Bing. 439.)

So that without going the length of *Brodie* v. *St. Paul* (1 Ves. Jr. 333) and deciding in this particular case that every part performance takes the case out of the statute, we decide that a land owner can in Ceylon recover for use and occupation without a notarial instrument, if there has been actual use and occupation.

There yet remains the question of evidence. In England, questions had been raised to the effect that, granted that the action of use and occupation lies, yet that, nevertheless, a demise not by deed under the statute could not be put in evidence. This difficulty was obviated by the statute 11 Geo. 2, c. 19, section 14 ; but had the true principle of the statute, and not its technical wording, been regarded, the statute would not have been needed. It was useless to give the action of use and occupation, and yet, by a technical construction, prevent the plaintiff from proving his case. This had been differently treated of late years. Thus in *Creswell* v. *Wood*, 10 A. & E. 460, it was held that an agreement, invalid for want of writing to satisfy the statute, has no tinge of illegality, and may be given in evidence with the same effect as any other pro-

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mise, binding in honor and conscience, though not in law. Thus again it has been held that this action is maintainable where no rent has been reserved and there is consequently no right to distrain. *Waring* v. *King*, 8 M. & W. 574 ; *Hamerton* v. *Stead*, 3. B. & C. 482, and in a very recent case it is laid down that use and occupation will lie without a demise and may be recovered upon a *quantum meruit*, *Hellier* v. *Selcot*, 19 L. J., n. s. Q. B. 295. That is, the action of use and occupation may in effect be regarded as an action for compensation, and all the evidence that is admissible to prove compensation is admissible in this action, (see also *Bird* v. *Higginson* above cited.)

The suit now before us being then maintainable, the only question is as to payment, the defendant admitting the compensation due, provided the court finds no payment ; the court below disbelieves the defence and and we see no reason to believe it. Judgment of the court belormed.

12*th April.*

Present :—THOMSON J.

P. C. Galle, No. 47,807. } *Saloe* v. *Fredericks.*

Maintenance —Ordinance 4 of 1841, section 4— notarial agreement not to sue,

The defendant was charged with leaving his children without maintenance in breach of the 4th section of Ordinance No. 4 of 1841.

He pleaded a notarial agreement entered into between the parties, wherein the complainant admitted " as I now require to be " married according to the custom of the world, I do hereby " acknowledge to have received in cash £15, and moveable pro- " perty to the value of £4, for the maintenance of myself, " and that of my child procreated by him. Therefore iu future " I myself, or any of the heirs of my estate, shall not bring or " cause to be brought any action against the said C. W. Fredericks, " and further that I cannot demand from him any money or things " on the ground that I have lived with the said gentleman, and on " receiving the said sum of £15 and property this agreement " is caused to be written."

The Police Magistrate found the defendant guilty in these terms :—

It was submitted on behalf of the defendant that the complainant having received a sum of money from defendant, and entered into the agreement put in evidence, whereby she agreed

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The court considers that no such arrangement with the mother of an illegitimate child will excuse the father from giviug support to his child. The default to maintain is made an offence by the law, and it is the right of the children to get support; and it is not competent for one person, by entering into contracts with another, to defeat the law or rights of third parties.

On appeal, the Supreme Ceurt upheld the conviction, seeing no reason to the contrary.

4th May.

Piesent:—Creasy, C. J.

P. C. Calpentyn, No. 796. } *Meera Saibo* v. *Sago*, et al.

False prosecution—practice—adjudication.

The following is the judgment of the Supreme Court :—

In this case the complainant appeals against that part of the Police Court Magistrate's judgment which "adjudges him (the complainant) to be guilty under the 21st clause of the Ordinance No. 13 of 1861, of bringing a false and malicious case, and sentences him to a fine and to the payment of the defendant's expenses."

The Supreme Court has repeatedly pointed out that Police Magistrates, before they thus fine a complainant, should call on him to shew cause, and should give him an opportunity of defending himself from the charge of having instituted a prosecution on false, frivolous and vexatious grounds. A complainant, if this opportunity is given him, may be able to allege and prove much, which could not have been brought to the Magistrate's notice before, and which would not have been legal evidence as against the defendant.

The Supreme Court has also pointed out that when prosecutors are thus fined, there ought to be an express adjudication on the face of the proceedings, following the words of the Ordinance, and stating that the prosecution was instituted on false, frivolous or vexatious grounds, as the case may be. See P. C. Galle, No. 41,179, reported in Bel, and Vand. p. 159, also P. C. No. 4,705, Harispatto and P. C. No. 29,128, Matara.

In the cases referred to, the judgments inflicting the fines were set aside; but in the present case, the Police Magistrate though he did not regularly call on the complainant to shew cause why he should not be fined, has evidently not acted with haste, but has

taken much pains in investigating the matter. The Supreme Court will not set his judgment aside, but will follow the course pursued in P. C. No. 2,767, Pantura, reported in Bel. and Vand's Report, 164.

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The case is sent back for further hearing as to the imposition of the fine, in order that the complainant may be regularly called on to shew cause why he should not be fined; and in order that a proper entry may be made of the adjudication of the fine, if the Police Magistrate, after having heard what the complainant has to say in his own justification, considers that a fine ought to be inflicted.

25*th May*.

Present :—CREASY, C. J.

D. C. Colombo, No. 74,294. } *Cowell* v. *Bastian Appu.*

Theft by carter—jurisdiction of Police Court—fraud—attempt to commit—criminal intent—law of Ceylon—*stellionatus*—*falsitas*.

On appeal against an acquittal, *Cayley* appeared for complainant appellant.

The following is the judgmeut of the Supreme Court:—

In this case, the defendant was charged before the Colombo Police Court, 1st with fraud, 2nd with theft.

It was proved that the defendant, who appears to have been a carter, brought two cart loads of coffee to the Hultsdorp Mills. The storekeeper ascertained by reference to the note and by measurement that there was a deficiency of more than three bushels. The defendant on being questioned about this deficiency admitted it, and gave no explanation as to how it was caused. He said that he did not know where the missing coffee was. He asked the storekeeper to give him a receipt to the effect that the full quantity of coffee had been delivered, and he proposed that he and the storekeeper should share between them the value of the missing coffee. He also produced eight shillings in money and gave them to the storekeeper as a bribe for the same purpose. His offer was refused and the present prosecution was instituted.

The cart note, or contract between the defendant and the owners of the coffee, was not put in evidence, as it ought to have been. Some legal evidence, however, of its contents may be gleaned from the proofs given of the conversations between the defendant and the people at the mills.

It may be legally inferred that money for the carriage of the coffee had not yet been paid, and that the defendant, if he had

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obtained from the storekeeper the false receipt for a delivery in full, would have been able to obtain, by means of it, from the owner, payment for the carriage of the whole quantity of coffee sent, whereas he was only entitled to payment in respect of the quantity actually delivered by him at the mills.

The Magistrate found the defendant not guilty, and in his judgment, with respect to the charge of fraud, he states that he is not aware of any law in force in the colony by which the facts proved against the prisoner are made an offence.

The complainant has appealed against the acquittal.

With respect to the charge of theft, the Supreme Court thinks that there is in this case evidence, and such as would be strong evidence to go to a jury, that the defendant stole the missing coffee, and theft by carters of the property entrusted to them is a very serious offence, so much so as to be beyond the jurisdiction of the Police Court.

The 8th section of the Police Court Ordinance of 1861, shews that the Police Court has no jurisdiction when the offence is one usually punishable by transportation, or by any severer punishment than three months' imprisonment, five pounds fine, and twenty lashes.

Thefts by carters are certainly usually punished much more severely than by these sentences, to which the Police Courts are restricted. The Magistrate should have acted under the 18th cl. and, instead of adjudicating as a Police Magistrate on the case, he should, if a justice of the peace, have taken proceedings in that character, or have caused the accused to be taken before some justice of the peace, so that he might be committed for trial before the Supreme Court.

With respect to the charge of fraud, it may be useful to draw attention to the judgment delivered by this court on December last on the criminal case reserved at the preceding Kandy session for the opinion of the collective court. We then fully investigated the question, whether there is any law in force in this colony analogous to the English law against cheats, and false pretences; and we came to the conclusion that such a law does exist here. It is the old law against the offence called by the Roman and Roman Dutch writers the offence of "stellionatus" or "falsitas." We pointed out in the judgment, that every case of fraud, which would fall within the English common law against cheats, or the English statute law against false pretences, would fall within the Roman Dutch law against "stellionatus" and "falsitas"—and we also pointed out the propriety of the courts here continuing to adopt the same limitary rules as to what kind of cheats and false pretences are criminally punishable, as prevail in the English courts of jus-

tice. If in the present case the defendant had obtained the false receipt in full from the storekeeper, and had, by means of it, obtained from the owners payment for the carriage and delivery of more coffee than had really been delivered, he would unquestionably have committed a fraud punishable by our criminal law ; but all that occurred here was the intent to commit that fraud, coupled with the dishonest proposals and offers to the store-keeper, which must be considered as having been made in furtherance of that interest. I think it clear that the law of this Island is, in this respect, the same as the law in England, and that although the mere intent to commit an offence is not in itself criminally punishable, if merely expressed in words, gestures or otherwise, without further proceeding to the crime to which it points, yet if it is accompanied by any act being a *proximate* step, and attempt towards the accomplishment of the crime, that act though in itself out of the reach of indictment, will not be judged alone but as coupled with the criminal intent which prompted it, and is therefore punishable on indictment.

I am adopting here, the expressions used on the subject by an excellent criminal lawyer, the late Mr. Justice *Talfourd,* in his edition Dickinson's Quarter Sessions, p. 286. I know that there is a passage in a book deservedly esteemed here,—Sir Charles Marshall's Judgments—which seems to lay down a different rule. The passage which I refer to is at page 590 and is as following :—" The general " rule is that success is necessary to complete the offence, unless the " means used constitute an offence in themselves, as forgery for " instance. Thus a man may be convicted of obtaining money or " goods under false pretences, but not if he have only attempted and " failed." These words of Sir Charles Marshall are avowedly *obiter dicta,* and not material to the adjudication of the case before the court. But whatever weight should be attached to them, they are certainly over-borne by what I consider to be a subsequent distinct recognition by our colonial legislature that the law of England by which attempts to commit crimes are themselves punished as crimes, is the law of this colony also. I refer to Ordinance No. 12 of 1852, which enacts, " that if on the trial of any " person charged with any crime or offence it shall appear to the " jury upon the evidence that the defendant did not complete the " offence charged, but that he was guilty only of an attempt to " commit the same, such person shall not by reason thereof be " entitled to be acquitted, but the jury shall be at liberty to return " as their verdict that the defendant is not guilty of the crime or " offence charged, but is guilty of an attempt to commit the same, " and thereupon such person shall be liable to be punished in the " same manner as if he had been convicted upon an information " for attempting to commit the particular crime or offence charged

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" in the information ; and no person so tried, as herein lastly mentioned, shall be liable to be afterwards prosecuted for an attempt " to commit the crime or offence for which he was so tried."

This clause is copied from the then recent English Statute of 14 and 15 Victoria c. 100, and seems to be treated as declaring and establishing the identity of our law with the English law as to criminal attempts being criminal offences.

It is probable that a question may be raised in the present case whether the defendant's acts in soliciting and giving money to the storekeeper were acts in their nature sufficiently proximate to the intended offence of fraudulently obtaining money from the owners. See as to this the judgment of *Cockburn* J. in *R.* v. *Macpherson,* xxvi L. J. M. C. 135, and that of *Blackburn* J. in *R.* v. *Cheeseman,* xxxi L. J. M. C. p. 90 and see *R.* v. *Roberts,* Dears. C. C. R. 559.

The course which I am about to take in dealing with the caso will give the opportunity for having such a question of law fully considered, if necessary, after all the facts bearing on it, shall have been fully and explicitly found by a jury.

The charge for theft must certainly come before a superior tribunal, and the charge of fraud, or attempt to defraud, can be preferred and investigated at the same time.

The Police Magistrate's judgment of not guilty is set aside, and the case is remanded to be dealt with by him as is pointed out by the 18th section of the Police Court Ordinance of 1861.

7th June.

Present:—Creasy, C. J., and Temple, J.

P. C. Kandy, No. 58,592. } *Ranmalle* v. *Kowralle.*

Evidence—finding upon facts—want of reasonable certainty—acquittal.

The Supreme Court ordered a judgment of not guilty to be entered, in these terms :—

The Police Court Magistrate has fined the first and 2nd defendants for assault, but he adjudicated on this part of the case in the following language. " The circumstances are doubtful ; for " the credibility of the complainant's witnesses is open to suspicion; " and there is an absence of unbiassed and disinterested testimony— " still though with considerable hesitation, the court inclines to think " what amounted to an assault, but not of a serious character, was " committed."

It is evident from these words of the Magistrate's that he had not that amount of certainty as to the guilt of these parties which he ought to have had before he convicted and fined them. A mere "inclination, to think prisoners guilty," coupled with considerable hesitation" and an opinion that the case is not supported by "unbiassed and disinterested testimony", cannot warrant a Police Court Magistrate, any more than it would warrant a jury, in finding men guilty on a criminal charge.

1864. June, 14.

14th June.

Present:—Creasy, C. J., Temple, J., and Thomson, J.

D. C., Jaffna, No. 12,869 } *Saverimuttu* v. *Ramenaden.*

Thesavalamai—contract for the future sale of land—necessity of publication and schedule—rights of pre-emptionary third parties.

Lorenz for plaintiff appellant.

The following is the judgment of the Supreme Court:—

The Supreme Court is of opinion that by the local law of Jaffna, publication and schedule are not necessary in order to make a contract for the future sale of land valid, as between the contracting parties. The case on the subject collected in Mr. *Muttukisna's* book have not consistency, clearness, or authority enough, to establish the necessity of a schedule and publication, where there is a mere agreement *in futuro*. And the Supreme Court cannot find that such necessity has ever been affirmed by it. The Supreme Court must determine the matter upon principle. It is clear from the Thesavalamai that the reason why publication and schedule are required in the transfer of lands is to protect the rights of third parties to pre-emption. They are not required for the benefit of either vendor or purchaser. An agreement for future transfer cannot prejudice the rights of pre-emptionary third parties, and as against them such an agreement may be void. But there is no reason why it should not bind the contracting parties as between themselves; and the Supreme Court does not think it equitable to allow the contracting vendor to defeat the claim of his contracting vendee, by setting up the *jus tertii*. He must do his best to fulfil his agreement. If, when he proceeds as he ought, to obtain *publication* and *schedule*, and to make an actual transfer of the property, if third parties should come forward with just claims to pre-emption, and if the transfer to the present plaintiff should be thereby prevented, the agreement would fall to the ground, inasmuch as the plaintiff was

1864. June, 16. — aware as well as the defendant of the necessity of publication and notice before actual transfer could be made ; and they must be taken to have made their agreement subject to such claims of pre-emption as may be put forward.

The Supreme Court cannot however give judgment for the plaintiff in the terms prayed for, which would be to disregard the possible rights of the third parties to become purchasers. The decree must be that the defendant do within two months after notice obtain publication and schedule for an actual legal transfer of the property to the plaintiff, and that unless valid rights of pre-emption are established by third parties, he do also execute an actual legal transfer of the property to the plaintiff, the plaintiff to pay the balance of the purchase money, and the costs of publication, schedule and conveyance. Liberty to either party to apply to the District Court, or to this court, for any further directions, that may be necessary for the carrying out of the judgment.

16*th June.*

Present :—CREASY, C. J., TEMPLE, J., and THOMSON, J.

D. C. Kandy, No. 33,498. } *Peter* v. *Fernando.*

Marriage—Reg. No. 9 of 1822—intended marriage—registration thereof—cohabitation.

The decree of the court below was set aside, and judgment entered for plaintiff in these terms :—

The regulation No. 9 of 1822 does not draw a very clear distinction between the registration of a "marriage" and an "intended marriage." And indeed the registration of an intention to marry, except in some cases under the 11th section, because it does not of itself constitute a marriage till followed by cohabitation and unless so followed, is no marriage at all. In this case, there has been a registration of the publication of banns, which may be considered equivalent to the registration of an "intended marriage" and for reasons above given sufficient to establish this marriage, followed as it has been by cohabitation. Moreover, the practice which has prevailed since the passing of the Regulation No. 9 of 1822 has so interpreted it, that the requirements of the 3rd clause are satisfied by the registration of an intended marriage, and that such registration followed by cohabitation shall be proof of marriage. *See* D. C. Galle, 15,144, 8th December, 1853, also *Civil Min.* 17th June, 1842.

24th June.

1864.
June, 24.

Present :—CREASY, C. J., TEMPLE, J., and THOMSON, J.

D. C. Kandy, No. 38407. } *Northmore* v. *Meyapulle.*

Purchase and sale—stolen property—sale at open shop—law of Holland—market overt—innocent purchaser—law of Ceylon.

The following judgment of the Supreme Court sets out the facts of the case :—

Two carters who were employed on behalf of the plaintiff to take 100 bushels of parchment coffee to Colombo, stole the coffee and sold it at the defendant's shop in Kandy. The shop is an open one and the defendant purchases and sells coffee to a large extent. The defendant's conicopulle was the person who actually bought the coffee from the carters. The defendant according to his own evidence gave a cheque on the next day for the greater part of the price of the coffee, some part having been paid in money at the time of sale. The defendant said on cross-examination: "I was told by my men that this coffee was brought in carts, parchment coffee. Now a days it is usual for coolies who work for 7½d. a day to bring 500 bushels of parchment coffee, and when asked where they got they say the conductor gave, or gentleman gave."

The carters were tried and convicted for the theft, and the the present action was brought by the plaintiff to recover value of the coffee from the defendant.

The District Judge has given the plaintiff a verdict, which the Supreme Court thinks perfectly right. An objection was taken in appeal that the identity of the coffee was not sufficiently proved but even if this was put in issue on these pleadings, it was proved by the defendant's examination. The main defence relied on for the defendant was that this was an honest *bona fide* purchase in a public market, and that the defendant is not bound to restore the coffee without compensation for the price he paid for it. Vanderlinden, p. 121, Grotius, p. 75, and Vanderkeessel p. 56, were cited on this point.

Voet, lib. 6, 1, 7 and 8 were also cited. They unquestionably establish that in Holland, a *bona fide* purchaser of goods in the public market place on a regular market day, was not compellable to restore them to the true owner, if they turned out to have been stolen, without receiving compensation for what he paid for them. There are no market places and stated market days here, like those in the Europeon countries ; and the Supreme Court inclines to think that consequently the exceptional privilege given to a purchase in market overt (as it is commonly called) does not exist here ; and that the owner of stolen property has a right to recover it absolutely from even an innocent purchaser. But even if there can ever be

1864. June, 29. — such a thing in Ceylon as a purchase portected by market overt, the Supreme Court holds clearly that the defendants private shop is not to be considered a public market ; and it also holds that a man who buys coffee of coolies and carters in the manner which defendant admits to be customary with him, and which was evidently the case here, is not to be regarded as an honest *bona fide* purchaser.

29th June.

Present :—CREASY, C. J., TEMPLE, J., and THOMSON J.

The Queen v. *Silva*, et al.

Criminal procedure—evidenee of witness before institution of charge—admissions of prisoners to justice of the peace before institution of charge—Ord. No. 9 of 1852, cls. 11 and 12—opportunity of prisoners to cross-examine when duly charged.

The following is the judgment of the collective court on the case reserved by the senior Puisne Justice :—

The prisoners were tried and convicted before the Senior Puisne Justice, at the first sessions for 1664 held at Galle on the southern circuit.

On the 26th September 1863, the justice of the peace, Mr. De Vos, enquired into the bank robbery. No one was then charged with the offence. Among others Don Brampy was examined on oath and made two depositions affecting the prisoners. The prisoners were taken into custody and charged on the 3rd October 1863. On 22nd October the justice of the peace had the depositions (A) and (B) read over to them, and they were told they could cross-examine the witness Brampy who was then and there present, and one of them did cross-examine him. Proof of this was given at the trial, and that Brampy was then too ill to attend, and his said depositions which purported to be duly subscribed were received under the Ordinance. (See Ordinance No. 15 of 1843, clause 24, and 9 of 1852 cl. 11.)

It was contended that the depositions A & B ought not to be received, as no one was charged with the robbery at the time when they were taken.

Mr. DeVos, the justice of the peace, went to the police station and received the statements of the prisoners, who were in custody on suspicion of the charge. The statements were in answer to questions put by the justice of the peace, they were reduced to writing and signed by the prisoners. No threat or promise was held out by Mr. De Vos to induce the prisoners to make or sign such statements.

These statements were objected to, on the ground that the prisoners were not first duly cautioned as required by Ordinance

No. 9 of 1852, clause 12, and that having been made to a person in authority, they could not be received. Also that these statements were made at a time when no person was accused (see Taylor on Evidence, 705.) 1864. June, 29.

We think that the evidence was regularly received, and that the verdict of conviction is to be sustained.

The first objection proceeds on the supposition that clause 11 of Ordinance No. 9 of 1852 should be read in connection with clause 24 of Ordinance No. 15 of 1843. Even if it were so, we think that the requirements of the Ordinance were satisfied, and that these depositions were properly taken against the prisoners under it, when the depositions were read over to them, and opportunity for cross-examination given, as stated in the case.

The second objection is wholly untenable. The prisoners' statements could not have been proved in the summary manner pointed out by the first part of clause 12 of Ordinance No. 9 of 1852; but the last part of that clause shews clearly that they were receivable, where formally and fully proved.

Conviction is affirmed, and judgment to be given and sentence passed upon the prisoners.

29th June.

Present :—Creasy, C. J., Temple, J., and Thomson, J.

Queen v. Don Louis.

Criminal offence—forgery—lapse of 20 years—Ord. No. 15 of 1843, cl. 45—"right of prosecution"—commencement thereof.

The following is the statement of the Senior Puisne Justice, before whom the case was tried :—

"In this case, the prisoner was put on his trial at Galle on the 31st March, 1864, for having in February 1843, forged a deed of gift (there was also a count for uttering on February 4th 1843.) It was contended on behalf of the prisoner that 20 years having elapsed from the date of the alleged offence, the right of prosecution is barred by Ordinance No. 15 of 1843, sec. 45.

"It was contended on behalf of the crown that the right of prosecution was not barred, inasmuch as the affidavit before the justice of the peace was sworn within 20 years from the date of the offence, viz. on the 4th November, 1862, which must be considered the date when the prosecution commenced.

"I directed the trial to proceed, reserving for the consideration of the collective court, the question whether the prosecution commenced on November, 4th 1862, the date when the affidavit was filed before the justice of the peace, or on March 31st, 1864, the date of the trial before the Supreme Court. The prisoner was found guilty."

1864. June 29.

The following is the judgment of the collective court :—

The question in this case proceeds on the words of the 45th clause of Ordinance No. 15 of 1843, which is as follows: "The right of prosecution for any crime or offence (other than treason or murder) shall be barred by the lapse of 20 years from the time when the crime or offence was committed." The court is unanimously of opinion that the words "the right of prosecution" must be taken to mean "the right to commence a prosecution", or in other words, a prosecution for any offence other than treason or murder must be commenced before the lapse of 20 years from the time when the offence was committed. A prosecution before the Supreme Court in this colony may be commenced by the information of a private person before a justice of the peace, and afterwards continued by the Queen's Advocate, and the court considers that as one and the same prosecution. Any doubt as to what forms the commencement of a prosecution was determined by the judgment of the fifteen English judges in *R.* v. *Brooks*, 1 Den. C. C., 217 and 2 C. & K., 402, in which they adjudged that a prosecution is commenced by information and issue of the warrant of apprehension, or at least by the apprehension of the prisoner. In the case before the court, the information was laid before the justice of the peace by an affidavit sworn in November, 4th 1862, that is, before the lapse of 20 years from the committal of the offence charged, and there were continuous proceedings founded on that affidavit leading in due course to trial and conviction.

The court is of opinion that the prosecution was commenced in time, or in the words of the Ordinance, that the right of prosecution was exercised before the lapse of 20 years necessary to bar it.

The judgment of the court is that the conviction be affirmed and that sentence be passed on Don Louis according to law.

29th June.

P. C. Negombo, No. 5181. } *Perera Annavy* v. *Fernando*, et al.

Disturbance of public worship—church discipline.

The following is the judgment of the Supreme Court :—

This is a charge of disturbing public worship against the Ordinance No. 17 of 1844 clause 36, and the Supreme Court agrees with the Police Magistrate in thinking that the evidence does not substantiate such a disturbance as was contemplated by that Ordinance.

It seems clear that the order of the priest was disobeyed by the accused, but merely in a matter of church discipline, with which the Supreme Court cannot interfere. Their offence appears on these proceedings to have consisted in disobeying the order of the priest by being present in their usual places in church and joining in the singing at the usual time and in the usual way. This, however wrong their conduct may have been, cannot be said to have amounted to a disturbance of public worship under the Ordinance. 1864. June, 30.

The Supreme Court wishes not to be understood as deciding that the temporal court ought to refuse to act, supposing that it were fully proved that, according to the well-known rules and rites of any congregation, certain portions of the service ought to be performed by certain persons only, and that other persons had wilfully thrust themselves forward and conspicuously and loudly taken part in such portions of the service in such a manner as to disgust and annoy the congregation by an unseemly irregularity. If such a case should arise, it will require and receive due consideration; but the present one is not proved to be one of that character.

30th June.

Present:—CREASY, C. J., TEMPLE, J., and THOMSON, J.

D. C. Galle, No. 21310. } *Adrian* v. *Silva.*

Malicious arrest—damages—execution of writ against person before that against property—R. & O, 4th July, 1840—malice.

The judgment of the Supreme Court sets out the facts of the case :—

In this case the plaintiff sued the defendant, who is a notary, for a malicious arrest. The District Judge has decided in favour of plaintiff ; and the Supreme Court thinks that the judgment is right, and also that the damage awarded £15 are not excessive.

It appears that the now defendant sued the now plaintiff in an action No. 16963 D. C. Galle for some land, to which both parties claimed title. The now defendant obtained judgment in that action on the 11th August, 1862, by which it was decreed that he should be quieted in possession of the lands in dispute, and that the then defendant should pay the costs. That judgment was affirmed on appeal by this court on the 2nd December of the same year.

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A writ of possession was moved for and obtained on behalf of the now defendant on the 13th December, 1862, but it was not executed until March, 1863; and it appears from a return of the vidahn aratchy, dated 5th January, 1863, that the delay in the execution of the writ of possession was caused by the opposition of the then defendant who is now the plaintiff.

The now defendant's costs in that suit were taxed at £12. 9. 6, and on the 14th January, 1863, the now defendant moved for and obtained writs of execution against property and person for these costs.

On the 16th January, both writs were ready in the Secretary's office; and in the regular course of business, they would have been sent together by the Secretary to the Fiscal, under rule 4 of the general rules respecting arrests, 11th July 1840, first to require payment to be made, or sufficient property to be pointed out under the writ against property. The fiscal would only, in default of that being done, have proceeded to execute the warrant of arrest against the person.

The plaintiff in this case had property enough (as the sequel shewed) to satisfy the writs, so that if they had been issued and executed in the regular manner, the now plaintiff would have been able to pay the money or to point out sufficient property under the writ against property. The writ against person would not have been used, and he would not have been arrested at all.

But on the 16th January, the now defendant, on whose behalf the two writs for the costs in the first action had been sued out, came himself to the Secretary's office and asked for the writ against person only. The Secretary gave it, and it only, to him.

The Supreme Court thinks that the Secretary in so doing acted very improperly, but the impropriety of one man's conduct cannot do away with the illegality of the conduct of another. The Secretary, when he gave the now defendant the writ against person, told him to take care not to have it executed before the writ against property had been executed. The now defendant, however, took the writ against person to the Fiscal's office, and the now plaintiff was arrested under it on that same day. The writ against property was sent off from the Secretary's office to the Fiscal's office late in the day and was not received by the Fiscal until the the 17th. The now plaintiff was taken to gaol on the evening of the 16th and was imprisoned there until the 20th, when he was discharged by the District Court, according to an application which was made on his behalf on the 18th. Afterwards, the Fiscal seized lands of his, of the aggregate value of £23. 5, under the writ against property. The costs were paid

and on the 19th February, 1863, both writs were re-called, as satisfied, by the now defendant. 1864. June, 30.

Such are the facts of the case, as collected from the proceedings in 16963, which have been put in evidence in this case, and also from the parol testimony given on behalf of the plaintiff in this case : testimony which was believed by the District Court judge who saw and heard the witnesses, and testimony which this court sees no cause to discredit, especially as the defendant did not venture to get into the box and give evidence the other way.

In order to apply the law properly to these facts, it may be well to bear in mind what are the various kinds of process, by which a judgment creditor may obtain satisfaction for his claim and costs in a money or damages case, or for his costs in a case like that, in which the now defendant recovered against the now plaintiff. Rule 35 of the Rules and Orders, sec. 1, (confirmed by Ordinance) makes this clear. It is in the discretion of the District Court judge to grant execution in any one of the three modes:—

There may be simple process against the property,—we may term this process No. 1 ;

or there may be simple process against the person,—we will term this process No. 2 ;

or there may be compound process, consisting by of a writ against the property, and of a writ against person : in which case the rule of the 4th July ordains that the writ against property must be executed first, and that the writ against person shall be executed only when the writ against property has been tried and found to be insufficient to procure prompt satisfaction of the claim. We will term this last, the compound process, No. 3.

In the case in which the now defendant proceeded against the now plaintiff, the court granted him process No. 3. But he has thought fit to put in force process No. 2, the simple and absolute process against the person of his adversary, which the court had not granted to him, and which he could not have supposed the court to have granted to him. Such conduct is to say the least of it, a gross abuse of the process of the court, and it would seem contrary to sound principles of law, if an individual, who was injured by such conduct, had no legal means of obtaining redress. It becomes however necessary in considering this case, to examine very carefully the exact nature of the wrong committed by the now defendant.

If the writ against the person of the now plaintiff under which he was arrested had been set aside by the court for irregularity, it would be as if such writ had never existed, and the defendant would have been responsible as a mere wrong-doer for his trespass against the plaintiff's person (*Codrington* v. *Lloyd*, 8 Ad and E, 449.,

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But as the writ was not set aside, the Supreme Court thinks the case must be regarded as one in which the tort consisted, not in any immediate violence to the plaintiffs' person, but in communicating an improper direction to the process of the law. Consequently the plaintiff must prove not only the arrest, but that the arrest was made maliciously and without reasonable or probable cause, (see notes to *Scott* v. *Shepherd*, in 1 Smith's Lead. Cas., vol., 1, p. 356-357.) The Supreme Court is however also of opinion, after carefully reading over and considering the whole proceedings, that there *was* malice on the part of the defendant and that there was also want of reasonable or probable cause.

The Supreme Court does not see what reasonable or probable cause for the defendant's conduct can be suggested. It is likely enough that he was very angry with the now plaintiff on account of the protracted litigation about the land, and the difficulty in getting possession of it. But that is not the kind of cause which can justify his conduct. This court does not see that he was under any erroneous impression as to his legal rights in issuing execution, even if such error could avail him as a defence. He is a notary and not to be supposed an ignorant man, and he was expressly cantioned by the secretary not to put in force the writ against person until after the writ against property had been executed.

With regard to malice, the absence of reasonable or probable cause is in itself evidence, though not conclusive evidence, of malice (Starkie on Evidence, ii. 684). This court must also remember the legal meaning of malice. Mr. Justice Bayley defined this well, in *Bromage* v. *Prosser*, 4 B. & C. 255, where he said "malice, in common acceptation, means ill will against a person ; but in the legal sense it means, a wrongful act done intentionally without just cause or excuse." This is well illustrated by the case *Crozer* v. *Pilling*, p. 26, (same volume of reports). There the defendant was held to be rightly sued for having maliciously refused to accept from a person under arrest the debt and costs, and to sign an authority to the sheriff to discharge the debtor. There was no special evidence of actual malice, but the Court of King's Bench held that "the act of the defendant in detaining the plaintiff in custody, after he had tendered the debt, was wrongful and must be presumed to be malicious in the absence of any circumstances to rebut the presumption of malice."

The Supreme Court thinks moreover that there is abundant evidence in the present case of the now defendant having acted out of actual ill-will and personal spite, and, annoyed, as it was said, at the difficulty of getting possession of land, he determined to punish his adversary by arrestiug him for the costs without giving him the chance of satisfying the claim for costs under the writ against property,

The Supreme Court would in conclusion give a few words of practical advice about the issue of these writs. If, when writs against property and person are issued, the secretaries of the courts would write across the writ against person the four words "with writ against property," or any similar memorandum, there could be no such abuse of process as has occured in the present case, and many mistakes and much consequent inconvenience might also be prevented. 1864. June, 30.

D. C. Trincomalee, No. 19559. } *Teyvana* v. *Sinnecooty* et. el.

Husband and wife—last will—common property—bequest by husband—disposal of propsrty not his own—intention of testator—claim of widow *jure uxoris* to her share—election by widow between bequest and her share—English law—law of Ceylon.

The following is the judgment of the Supreme Court :—

The appellant in this case is the widow of the testator at the time of the making of the will, and down to the time of the husband's death, a considerable amount of property, some moveable some immoveable, was the common property of husband and wife according to our Roman Dutch Law, the husband being sole manager of it, and having power to bind the wife's share by his contracts.

By the will which is filed in the District Court case before us, the husband makes various bequests out of which he terms "his moveable and immoveable property." There is nothing in the will that shews clearly and decisively whether the husband, when he made it, was aware that half the common property would on his death devolve to the wife by operation of law, and that he could only exercise testamentary power over the other half, or whether he thought that he had the same power to bind the whole of the common property by his will, that he had to bind it by his contracts. The clause chiefly relied on by the respondents (executors) in this litigation will be specially referred to presently.

The wife claims to have half the common property given over to her *jure uxoris*, and she also claims to receive her legacy under the will.

The executors say that she cannot have both, and must be put to her election.

This was very properly treated on behalf of the respondents as the sole point in dispute in the argument before us. There was no pretence for maintaining that she had already exercised her right of election; and the question about her marriage had been given up in the court below.

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The right of the executors to put the widow to her election, depends on the assumption that the testator's will was designed by him to apply to the whole of the joint property, and not merely to his own moiety of it. If it was so designed, the widow cannot (in Scotch phrase) *reprobate* the will so far as it affects her moiety of the joint property, and at the same time *approbate* it so far as it gives a legacy to herself. If she takes the benefit of the legacy, she must make good the testator's attempted disposition. Equity will sequester the property bequeathed to her for the purpose of making satisfaction out of it to the person or persons whom she has disappointed by the assertion of those rights, (see 329 *D. C. Matura*, Joseph and Beven, 52.)

It being, as we before said, doubtful after careful examination of the whole will, whether the testator believed that he was exercising his testamentary power over the whole of the joint marital property, or only over his own moiety of it, we must look to the authorities to see what is to be done when the design of the testator is thus left doubtful. Burge says (iii, 717) that the intention to dispose of property which is not his, must be manifest, not conjectured." Mr. Justice Williams in his book on Executors (ii. 1300) says "the intention of the testator to dispose of the property which is not his own should be clear; the intention must appear by demonstration plain, by necessary implication." Other authorities to the same effect might be added, but these are sufficient.

A class of English cases have been cited in the argument against the widow, which arose out of the old English law as to dower. Most of them will be found in Williams, from p. 1302 to 1305. In all of them, some portion of the testator's real estate (which would by common law have been liable to the widow's claim for dower) had been devised by the testator in such a manner as to make it impossible or extremely difficult for the property to be dealt with as directed by the devise and yet the widow's claim to dover out of it to be satisfied. In such cases, the widow was put to her election. The present case was alleged to fall within the principle of those decisions on account of a clause in the will by which the testator bequeathes a specific house to his brother. This was likened to the case of *Roadley* v. *Dixon*, 3 Russ. Chan. Cas, 192, where the devisees in trust of the whole of the testator's property were directed by the will to occupy and manage a certain form during his son's minority. The widow to whom an annuity had been bequeathed was put to her election between the annuity and the will. But Lord Lyndhurst, who decided that case did so on the express ground that the intention of the testator as to the occupancy of the farm was inconsistent with the idea

that part of it was to be assigned to the widow by metes and bounds. And it will be found that the old English Law about metes and bounds was the foundation of all the cases in which the widow was put to her election between dower and legacy (see Lord Ridesdale's words as quoted by Lord Lyndhurst in *Roadley* v. *Dixon*, p. 201. 1864. July, 1.

Now we have no law here about assigning the widow's moiety by metes and bounds, and the analogy of *Roadley* v. *Dixon* and similar cases therefore fails. Moreover in England it is held that a simple devise of lands does not import an intention that the devisee should take the lands discharged of the widow's right to dower. Something more is needed. A mere devise of the land is consistent with an intention that the devisee should take it subject to the legal incidents attached to the testator's estate in them. (See Sir James Wigram's judgment in *Ellis* v. *Lewis*, 8 Jurist 238; Law Journal, 1844, Chan. Cas. 210).

We therefore think that the first part of the District Court judge's judgment, by which the widow was put to her election, is erroneous, and the executors are decreed and ordered to deliver and pay over to her half of the joint property, the amount to be ascertained in the District Court, and also to pay to her the legacy of one-eighth of the husband's moiety of the joint estate, after due deduction for debts paid and other legitimate disbursements.

1st July.

Present :—Creasy, C. J., Temple, J., and Thomson, J.

C. R. Calpentyn, No. 20506. } *Vyravan* v. *Ooduma Lebbe*.

Per Curiam :—The title to the land is put in issue by the answer, and the value of the land being above £10 that title cannot be tried in the Court of Requests. Neither can damages claimed in respect of land above £10 in value be tried in the Court of Requests where the title to the land is put in issue. See *C. R. Ratnapura* 859, 15th July, 1861.

Jurisdiction —value of land—damages.

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6th July.

Present:—Creasy, C. J., Temple, J., and Thomson, J.

D. C. Badulla No. 342. } *Soodoo Banda* et. al. applicants respondents. *Kumarihamy*, opponent appellant.

Letters of administration—application for—stale application—procedure.

The following judgment of the Supreme Court sets out the facts of the case :—

In this case, the respondents who claim to be grand nephews of the intestate applied, 22 years after his death, for citation, commission of appraisement, and for grant to them of letters of administration.

They shewed that the widow was and had been, ever since the death, in possession of the lands, and they alleged that she was alienating portions of them to the prejudice of the applicants who were entitled to succeed to the lands as next of kin.

The District Court made an order for the issue of the citation and of the commission of appraisement.

The widow entered an opposition to the application of the alleged next of kin, and a motion was made on her behalf that the citation and commission should be suspended until the objections to the application should be argued and determined. The District Court disallowed this motion, against which disallowance the present appeal has been taken.

The Supreme Court has frequently expressed its opinion that letters of administration should not be granted after a lapse of many years, except under very special circumstances shewing the need of such a grant, and unless the delay of the applicants is satisfactorily explained. See D. C. Jaffna 7529, *Lorenz's* Rep. 95 ; D. C. Caltura 414, 18th November 1852, where the Supreme Court followed the Rules of the Prerogative Court of Canterbury as to not granting either probate or letters of administration after a lapse of five years, unless the delay was satisfactorily accounted for. See Williams on Executors, i pp. 292 and 393 also D. C. Chilaw, No. 14103, 18th June 1850, in which Sir William Carr sanctioned the refusal of stale applications for administration, and truly remarked that "such stale applications, unless sought for some special purpose, only serve to foment family disputes and litigation." (D. C. Galle, 29 March 1854.)

The practice of the Colombo District Court in such matters is to refuse the application for citation and commission of appraisement in the first instance, unless the applicant accounts for his delay and shews the need of administration being granted though so long after the death. This is, the Supreme Court thinks, the right

practice, as it saves the expense of citation and appraisement in cases where it is not proved to the court that letters of administration ought to issue.

Had this practice been followed in the present case, the order for citation and commission would never have been made at all, as the applicants gave no explanation of why they had delayed for 22 years, and shewed no necessity for the appraisement as administrators. If as remainder-men they have any just cause of complaint against the widow for waste, they have another remedy open to them.

Under these circumstances, the motion on behalf of the widow to suspend the execution of the *ex parte* order for citation and appraisement until the question of the grant of administration had been settled, was, the Supreme Court thinks, reasonable and ought to have been allowed.

12th July.

Present:—Creasy, C. J., Temple, J., and Thomson, J.

C. R. Chavagacherry, No. 11628. } *Valliammai* v. *Canapady Pulle.*

Thesavalamai —devolution of property.

This case was remanded for further evidence, in the following judgment of the Supreme Court:

The law in Jaffna seems to be that if a man having one daughter wishes to marry again, the grand mother or nearest relation of that daughter takes charge of her, the father at the same time handing over the "whole of the property brought in marriage by his deceased wife and the half of the property acquired during his first marriage." From the defendant's examination, it would appear that this property was not acquired till after the dissolution of the first marriage, and that his daughter the plaintiff, is consequently not entitled to any part of it. Evidence should be taken to ascertain when this property was acquired, and if acquired after the dissolution of the first marriage and the giving over of plaintiff to the charge of the grand mother, whether the plaintiff is now entitled to any share of it—and also, if defendant failed to give to plaintiff the share of the property at the time she was given in charge of the grand mother, whether she, the plaintiff, is not now entitled to the half of the property acquired up to the time when she claims a division.

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D. C. Jaffna, No. 13726. } *Ramalingam Chettiar* v. *Sandeperumal Pulle.*

Sequestration —practice.

The following is the judgment of the Supreme Court :—

In this case the plaintiff obtained a mandate of sequestration of the defendant's property, on affidavit of date, and on affidavits that the defendant was fraudulently alienating his property.

The defendant moved to have the sequestration recalled and cancelled, on affidavits denying the existence of the debt, as well as the fraudulent alienation.

On the hearing before the District Court Judge, the only point insisted on, on behalf of the defendant, appears to have been his denial of the debt. The parties were examined as to this, their conflicting statements were heard, and the District Court Judge determined that there were as good grounds for believing the defendant as the plaintiff, and he ordered the sequestration to be recalled and cancelled, as the plaintiff had not satisfied the court, that he had good cause of action against the defendant.

The Supreme Court thinks that the course taken here of trying the question of the existence of the debt in the interlocutory proceeding was erroneous. If the plaintiff's affidavit of the cause of action is on the face of it satisfactory, and if there is also no objection apparent on the face of the plaintiff's libel, to the plaintiff's right to recover, the defendant is not at liberty, except in very extreme and exceptional cases, to anticipate the trial of the merits of the case, and to go into the question of the existence of the cause of action, on a motion to cancel the sequestration. If he can shew clesrly, simply and conclusively to the court, that there is no debt due, as by producing a letter of plaintiff's (the genuineness of which is not disputed) stating that there is nothing due, or by producing an undisputed regular receipt for the very debt, or the like, the court may properly attend to such proof on the defendant's part and may cancel the writ, which has palpably been issued in gross abuse of the process of the court.

Such is the practice of the English Courts, as to the discharge of debtor's arrested under writs of *ca-sa.* And the Supreme Court thinks that the analogous rule which has been generally followed here as to mandates of sequestration, ought to be upheld,—otherwise there would be the obvious inconvenience and mischief of trying the case twice over, and in such a manner that the decision on the interlocutory trial, although on imperfect materials, would have a natural and almost inevitable tendency to influence the decision on the second trial.

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Too much care connot be taken to prevent the abuse of writs of sequestration, by requiring those who obtain such writs to give sufficient security, and by the court fully satisfying itself that the defendant is really fraudulently alienating his property.

These are matters which may be righty examined into in the interlocutory enquiry. They seem to have been lost sight of on this occasion and the case had better be remanded to give an opportunity for their consideration.

Order set aside and case remanded for further hearing and consideration as herein pointed out.

D. C. Colombo, No. 33,749. } *Madasamy Asary* v. *Sangarlingam Cannan.*

Writ of execution—practice—arrest of person—absence of judgment creditor—want of stamp for warrant of committal.

The order of the court below, which was appealed against, was affirmed in these terms:—

The appellant in this case obtained judgment against one Sangaralingan Cannan, and execution against person and property was issued on the 12th November 1863. The defendant was arrested on the 19th and the Fiscal in obedience to the requirements of the writ, on that day brought the defendant before the District Court. The plaintiff was not present, nor was any advocate or proctor present on his behalf, and no stamp for the warrant of committal (as required by the Stamp Ordinance of 1861) had been lodged with the officer of the court. Under these circumstances, the District Judge discharged the defendant. The appellant contends that this couse was improper.

This question of practice affects matters of daily occurrence in the various district courts throughout the Island, and is really more important than many cases of more imposing appearance. We have therefore made careful enquiry as to what has been the custom of the District Court of Colombo, which is generally, and properly so, looked to by the other courts as a pattern in matters of practice, but which may sometimes err and allow wrong practices to become established. We find that the usual course has been for the Fiscal's officer, when he has arrested a debtor, to bring him to the District Court; but, if neither the plaintiff nor any one on his behalf is in court, the debtor and the return of the writ are not actually brought to the notice of the District Judge on that day, but the debtor is taken to jail and brought up on the following day, when if the plaintiff or his representative is still absent, the debtor and the writ are brought to the notice of the judge, and the debtor is discharged.

1864. July, 12. It seems however, to have occurred to the learned judge at present officiating in the Colombo court that this practice is erroneous, by reason of the want of any legal authority for the debtor's being taken from the court to prison and detained there until the second day, there being no warrant of commitment by the court. At first the 6th rule of section 14 of Ordinance No. 1 of 1839 seemed to meet the difficulty. That rule directs that "after any "person shall have been taken into the custody of the Fiscal under "any civil process, such person shall not be allowed by any Fiscal, "deputy fiscal or gaoler, on any pretence, to go beyond the walls "or other enclosed limit of the prison in which such person may "be confined, unless upon the special rule and order of some "competent court, requiring the attendance of such person, or on "the application of such person to be carried before any such "court for the purpose of prefering any complaint or application." But, on consideration, we think this rule applies to prisoners brought in on writs of commitment, and to persons whom the Fiscal has merely arrested under process against person. If the rule did apply to these last mentioned cases, the present practice of taking the debtor out of the gaol to the court on the second day without any special rule or order or application of the prisoner would be illegal. The arrested man, if once within the gaol, would have to be kept permanently in gaol, and there would be no warrant at all of commitment by the court. But the law evidently intends that there should be a warrant of commitment before a debtor is permanently imprisoned, and the form thereof is given in the schedule to the Rules and Orders. We think that the 6th rule of section 14 of the Ordinance No. 1 of 1839 applies only to cases where the debtor has been committed by the court, and is meant to explain and enforce the duty imposed upon Fiscals by the last branch of the first section of that Ordinance, which requires Fiscals to receive and detain in prison such persons as shall be committed to the charge of such fiscals by the courts or other competent authority. The other class of the fiscal's duties, that of executing process and making return thereof to the courts, is separately enjoined by the first branch of the clause of the Ordinance.

The writ under which a fiscal arrests a debtor directs that the debtor shall be brought before the court forthwith (see form 6, appendix to Rules and Orders, section 1); it certainly empowers the fiscal to keep him safely till brought before the court, but still the man *is* to be brought before the court *forthwith*, that is, with all reasonably possible speed; and bringing him before the court does not mean merely leading the man to the precincts of the court, and taking him away again if the adverse party is not present; but it means bringing him into court, and bringing the

matter before the notice of the judge, with whom it rests to determine whether the warant of commitment to gaol is to be made out or not, and this ought to be done on the same day, and in the course of the same sitting of the court, during which the debtor is brought in. 1864. July, 15.

We do not think we ought to prescribe to the District Judges the precise hour or period of the sitting at which such business should be done—such matters of arrangement must be left to those who preside there to determine, having regard to the interest of all parties, including the other suitors who also have business to be attended to.

The present appellant urges in his appeal the hardship and fraud that might be caused if the fiscal's peons, in collusion with the debtor, could watch the occasion of the temporary absence from court of the plaintiff or his proctors and seize the moment to bring the prisoner before the court. We think this might be obviated by the plaintiff's taking care to lodge with the Secretary the proper stamp for the commitment, which might fairly be taken to operate as a caveat against the defendant's discharge for want of an opposing creditor; and it might itself be considered by the judge as a motion on behalf of the creditor that the debtor should be committed unless he shewed cause to the contrary. We do not think that the District Judge is required to ascertain whether batta has been lodged or not. That is a matter which the creditor may arrange with the fiscal, bearing in mind the duty of the fiscal to apply to the court, and the duty of the court to discharge the prisoner forthwith if the batta is in arrear—See Ordinance No. 1 of 1839, clause 17.

In the case before us we do not think there has been any error in the course pursued.

15*th July.*

Present:—Creasy, C. J., Temple, J., and Thomson, J.

In re *Daniel McSweeny.*

Criminal procedure—prisoner under sentence—escape from gaol—application for *habeas corpus.*

The particulars of this matter, and the manner in which it came before the court, appear in the following observations written and delivered by the Chief Justice:—

A petition has been sent to one of the judges by this prisoner who is now in the gaol at Galle. The petition has been answered, but we also notice it here publicly on account of what really occurred, and on account of what has been supposed to have oc-

1864. July, 15. — curred when this prisoner was placed on the bar of this court of the 21st of last month. We also have taken the precaution of placing in writing the observations which we are about to make, so that there may be no misunderstanding as to the proceedings of the court on this occasion, like the misunderstanding which has existed as to what was said and done here on the previous occasion which has been referred to.

On the 14th of June, a motion was made before us and granted for a writ to bring up Daniel McSweeny, who was stated to be in the custody of the Fiscal of the Western Province. It was stated to us that this prisoner had been tried and convicted at the last criminal sessions of the Supreme Court at Galle and that he had not been sentenced in consequence of his having made his escape from the gaol. As the power of this court in such matter had been very fully considered in the recent Batticaloa case, (7th November, 1862,)* there was little or no discussion when this motion was made, though the court referred to the Batticaloa case, which is an authority as to the power of the court, and which also furnishes a valuable precedent as to the forms to be observed, and as to the materials necessary to be brought before us.

The applicants sued out a writ in the regular form of a *habeas corpus cum causa ad subjiciendum.* It required the Fiscal to bring Daniel McSweeny before this court to "do and receive all and singular the things which this court should consider of in his behalf," and it commanded the Fiscal to "state under what authority he detained, and the cause of the detention of the said Daniel McSweeny." On the 21st of June, the Fiscal brought Daniel McSweeny here into Court and he was placed at the bar in custody before us. The counsel for the crown moved that the sentence should be passed upon him, in pursuance of his trial and conviction at the last criminal sessions of the Supreme Court at Galle. The record of the trial was produced, shewing the information, the verdict and nothing further. The copy of the Galle calender was also produced, having on it a memorandum purporting to be made by the Registrar respecting this prisoner, which memorandum we considered not to be of itself evidence of which we could judicially take notice. It is to be remembered that Daniel McSweeny, when placed at our bar ,had no counsel or professional assistance, so that it became peculiarly our duty to watch the proceedings strictly on his behalf and to take care that we did not act against him on any thing that was not legal evidence. On looking at the return to the *habeas corpus* we

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* In re *Valaidepodi,* reported at p. 186 of Rama-Nathan's Reports, 1860-62.—Ed.

found it to be in these words. "I hereby produce the body of the within named Daniel McSweeny as commanded by this mandate." This was the whole return—no cause or authority whatever for detaining the prisoner was shewn. 1864. July, 15. —

Very different had been the course taken in the Batticaloa case. There, every document connected with the case was carefully brought before us and properly verified. All the circumstances of the trial, the escape and the re-capture were fully set out, and even the precaution of having a jury summoned and ready to be instantly impanelled, if the man at the bar raised the issue of his identity with the man who had been convicted and escaped at Batticaloa.

The Batticaloa case is not merely a precedent because it occurred in this court, but because it is founded on the English cases in the English Court of Queen's Bench, which we look to as our ruling exemplar in such matters. See, for instance, *The King* v. *Garside and Mosely*, reported in the second volume of Adolphus and Ellis. The report (p. 269) shews that on the prisoner being brought into court, Sir John Campbell, the Attorney General, informed the court that the constable and keeper of the jail of Chester had made his return to the *habeas corpus*. On the Attorney General's motion the return was then read, setting forth the original commitment and its cause, the trial, conviction and sentence, and the several respites by letters from the Secretary of State. The Attorney General also informed the court that the indictment and record of conviction had been returned under the *certiorari*, and they also were read upon his motion. So, in the case of *The King* v. *Rogers* and others, reported in 3 Burrows, a case where a number of prisoners had broken out of Maidstone jail and had been recaptured, on their being brought before the King's Bench, the report states that "The respective writs and returns were read, from which it appeared that they were in custody, upon conviction of felony, for highway robbery, and detained upon warrants from the Coroner of Kent on inquisitions found for wilful murder." All the authorities shew the necessity of full and regular materials being brought before a court of Supreme Criminal Jurisdiction when called on to exercise a special authority, such as we were, when this prisoner was here. We were asked to allow an amendment of the return to the writ of *habeas corpus*. Had the necessary amendment been one of mere form, we should probably have allowed it. But an amendment in this case, to be effective, must have amounted in substance to the introduction of an entirely new return. This we thought, and think, ought not to be allowed. We pointed out the distinction between amendment of form and of substance, and we believe that we used almost the very words of

1864. July, 15. — Justice Doddrige in the old case of *Dr. Alphonso* v. *The College of Physicians*, reported in 2 Bulstrade 259. There, as in the present case, no cause for detention was shewn on the return. It was moved to amend the return by setting out a commitment; but the court answered that "matters of form only is amendable, but not matter of fact which goes in justification."

On the materials which we had before us, we could neither sentence the man, nor could we direct him to be detained in the Fiscal's custody. He stood before us in detention for which no authority or cause whatever was shewn. Our duty was to terminate that apparently illegal detention, by ordering the man to be discharged; and we did so. But we never assumed the power of giving the man a pardon for all offences which he might have committed, or of annulling his liability to suffer under sentences against him which might exist, though we had then no judicial notice of them. Our assumption of such a power, if attempted, would have been futile; but it was not attempted, and we cannot refrain from observing that the Senior Puisne Justice expressly stated, when the discharge was ordered, that the discharge pronounced by the court extended only to what had been before it.

It has been necessary to review fully and to state the true character of the former proceedings, in order to make it appear why we have refused to interfere in behalf of this man upon his present petition. The petition itself shews, and the report of the Queen's Advocate (to whom the petition in the regular course of business was referred) fully sets out, that the petitioner is now detained in Galle prison under a regular commitment in pursuance of a sentence of imprisonment passed on him by the District Court of Galle, before which he was tried and convicted. This was a matter which was not brought before our notice when the prisoner was here, and we could not possibly have released him from his liability to suffer the consequences of it. No commitment by the District Court of Galle, appeared on the return to the *habeas corpus*—none of the documents before us disclosed any trial or sentence in the District Court of Galle. Some members of this court did not in point of fact know that anything of the kind had occurred, and none of us had the means provided for taking judicial notice of it. The petition now addressed to us is not a formal application for our intervention by any regular course of law, but, if it appeared that there was no legal cause for the man's detention, we should have taken care that proper means were used to liberate him; nor should we suffer any man to be re-imprisoned for any matter which had already been considered by us, and adjudicated to be an insufficient cause of detention on a return to a *habeas corpus;* but this man is clearly in prison for a matter which never has been dealt with by

us judicially at all ; he is clearly in prison under a sufficient warrant, in pursuance of a regular sentence by a competent tribunal, and we therefore do not interfere in his behalf.

1864. July, 15.

D. C., Jaffna, No. 463. } *Reg.* v. *Santia Adial*, et al.

Nuisance—Ordinance No. 15 of 1862, clause 1, section 11—deposit of cocoanut husks—act of agent act of principal—injury to health—evidence—difference between common law nuisance and statutory nuisance.

The order of acquittal of entered by the learned District Judge was set aside and a verdict of guilty ordered to be entered against all the defendants except the one with reference to whom the prosecution was waived.

In the following judgment of the Supreme Court, the facts of the case are sufficiently explicit :—

This is an information brought by the Queen's Advocate against the defendant under the Nuisance Ordinance No. 15 of 1862, clause 1, section 11, for keeping and depositing cocoanut husks and coir near public thoroughfares and dwelling houses, and in such a manner as to be injurious to the health of persons residing in the said houses.

After hearing much evidence on both sides the District Judge has acquitted the defendants, and the first reason for the acquittal given in the judgment is that the defendants have not been proved either to have themselves deposited or placed the cocoanut husks in the spots in question, or to have employed the coolies, who were seen placing the substances there. The District Judge seems to have thought it necessary that the coolies should have been made witnesses, in order to prove their employment by defendants; and he expresses a doubt whether even this would have been sufficient. But it is perfectly clear from the evidence that the defendants were present when the husks were being buried. One witness says that they employed the coolies ; and we have found it impossible to read through the evidence without clearly seeing that the defendants were present taking part in the depositing of the objectionable substances, by directing those who did so, even if they, the defendants, did not join in the work with their own hands. To insist on the coolies being called to give evidence of employment would be practically to make the Ordinance inoperative. There is quite as much evidence on the face of these proceedings as is usually obtainable in such cases ; and we are perfectly satisfied that the defendants are legally responsible under the Ordinance for the acts complained of, supposing such acts to amount to an offence under the Ordinance.

This is the real point in the case : whether such bringing of

1864. July, 15. coir husks as took place here, is punishable under this Ordinance; and the District Judge has with very laudable care proceeded in his judgment to deal fully with this question; but we differ from him as to the conclusion in favor of the defendants, at which he has arrived.

The error into which, as it seems to us the District Judge has been drawn, has been caused mainly by not keeping steadily before the mind the true nature of this proceeding. This is a prosecution under a particular Ordinance. The simple question is whether an offence under that Ordinance has been committed. But the case has been dealt with in the court below as if it had been a common law indictment for a nuisance, or common law action to recover compensation for damage caused to an individual by a nuisance. In such proceedings very different questions on the law of nuisance may and often do arise, as to the tests for determining the reasonable use of old trades in proper places, though they annoy other people; as to what is to be done, when the complainant has come to the nuisance and the nuisance has not been brought to the complainant; as to the effect of the balance of public benefit, and the like. See *Hole* v. *Barlow*, 27, L. J. C. P. 207, which was supposed to be over-ruled by *Bamford* v. *Townley*, 31 L. J. Q. B. 286, but declared in *Wamstead Local Board of Health* v. *Hill*, 32 L. J. M. C. 135, to have only been overruled in a limited sense. In the last mentioned case, Mr. Justice Willis speaks of the question as to the law of nuisance as "difficulties about which judicial minds have gone astray in one direction or another.

But none of these difficulties arise in considering the present case under the Ordinance. The words of the Ordinance are perfectly clear, and their proper application to any given state of facts is easy. The Ordinance forbids *inter alia* the depositing of cocoanut husks in such a place or manner as to be a nuisance to any person or as to be injurious to the health of any person. The word "such" in the phrase "such places and manner" is connected with the words "as to be" in the next line. We should not pause to notice this, had it not been for the idea expressed in the judgment of the District Court that the apodosis to "such" must be sought for in the 3rd and 10th sections.

It may be well to remark that the words of the Ordinance, which forbid certain substances to be deposited so as to be a nuisance to any person, or so as to be injurious to the health of any person, are not tautological. There may be a nuisance without injury to health. (See *R.* v. *Neile*, 2 C. P. 485).

The first part, of the clause has therefore its own appropriate meaning, and the last part, by an absolute independent prohibition of the deposit of noxious substances so as to be injurious to health,

has prevented the possibility of a prosecution for injury to health being defeated by subtile objections; that might have been taken, if the clause had only contained the words "so as to be a nuisance." It might then have been plausibly argued that "nuisance" must mean "that which the law holds to be a nuisance;" and so, all the difficulties about the law of nuisance, to which we have already adverted would have been introduced into proceedings under this Ordinance. We say nothing about the validity of such an argument. It cannot arise at all here, if the case be treated (as it seems to us it may be treated) in this simple manner. "Did the defendants deposit cocoanut husks in such a place and iu such a manner as to be injurious to any person's health." 1864. July, 15.

One branch of this question we have already dealt with, and have decided that under the circumstances of this case the burying of the husks by the defendant's coolies is to be considered as the act of the defendants. Now it remains to be seen whether the burying of the husks in these pits has been injurious to any body's health.

Two householders Mr. Dunlop, and Mr. Folkard, who live near the pits, where the husks were and are habitually deposited, and where they were deposited by the defendants, appear as witness to this. They give full and clear evidence that the stench from the coir pits is felt strongly in their houses, that it is a very offensive and sickening smell, producing feelings of nausea, prejudicially affecting sleep and sometimes causing vomiting. They state positively that the deposit of the coir and husks in these pits produces the abovementioned effects on themselves and their families, and this annoyance is not temporary and occasionally only, but that it is continuous for long periods, though worse at sometimes of the year than at others. If this evidence is correct, the case is proved. It seems a waste of time to demonstrate that a stench in a man's dwelling house, which affects him so far as to produce nausea, and to prevent him from obtaining, the natural full amount of refreshing sleep, must be injurious to his health. But this evidence may be incorrect. The witnesses may not deserve credit, or they may be under an erroneous impression, as to the cause of the evils, under which they suffer. If the District Judge did not believe Mr. Dunlop and Mr. Folkard, he should have said so. He does not do this, but he expresses an opinion that the annoyance caused to them cannot have been of such an amount as to be punishable under the Ordinance, because it has not been of such an amount as to drive them out of their houses. Such a test is quite erroneous. It is enough, if the matter complained of has been injurious to health, and, if the evidence of these witnesses is believed, the stench caused by the deposit in these coir pits has decidedly been so

1864. July, 15. — The usual and proper scientific evidence in cases of this description, was adduced by the prosecution to confirm the testimony of Mr. Folkard and Mr. Dunlop. Dr. Wambeek proved that sulphuretted hydrogen gas is produced in these coir pits, so that even when largely mixed with common atmospheric air, its effects must be injurious to persons residing in the neighbourhood, that it might produce such symptoms as those complained of by Mr. Folkard and Mr. Dunlop ; though its effects on different people would be various, and would depend to a considerable extent on the peculiar constitution and physical condition of each person, and that some individuals might exhibit no ill effects from being exposed to it.

The evidence for the defence amounted to this, that two or three persons, who passed along the road near these pits, thought the smell from the pits no nuisance, though at times it was a little disagreeable. That two or three persons, who had lived in that neighbourhood (some for short periods of time) had not had their health injured by the stench, and did not mind it, though one of these witnesses admitted that his family complained of it. One witness pointed out that the noxious gas might be prevented from coming into the house by the doors and windows being shut up : but we do not think that a man has a right to create such a stench near his neighbour's house, that his neighbour, in order to escape its effects, must debar himself of light and air. It was proved that the people working at the pits experience no visible immediate ill effects from the noxious air. This however does not disprove the evidence for the prosecution. No fact is better known than that the occasional exposure of a human being for a short time to an atmosphere much vitiated, but not to such an extent as at once to stop the vital actions of the body is not so injurious, as is permanent exposure to an atmosphere vitiated in a much less degree. It is, above all, the being obliged to sleep in a stench that injures health, not always, and not often by bringing on sudden and violent illness, but by slowly and insidiously weakening the system, and depriving the man of the natural healthy vigour and vitality, though no specific disease included in the medical writer's list of maladies, may be produced. One medical witness who was called for the defence, stated at first, that sulphuretted hydrogen was not produced in these pits ; but it appeared that he did not know of his own knowledge whether the water on which he experimented had been taken from the pits, and after giving his evidence, he experimented on water which did come from them ; and with creditable candour he came back to court and stated that the water in the pits did contain sulphuretted hydrogen, thus corroborating the evidence for the prosecution. The District Judge

in his judgment speaks of poisonous gases existing in theory : the evidence shews that the sulphuretted hydrogen exists in fact and we can discern no proof of the co-existence of anything, by which its natural ill effects are neutralized. 1864. July, 19.

There is much statistical evidence which shews that cholera has not been more prevalent in this neighbourhood than in others. But the District Judge truly says in his judgment that it is impossible to assign any reason why cholera should be more ripe in one place than in another ; and this evidence is therefore valueless.

But the portion of the evidence for the defence, which has clearly weighed most in determining the judgment of the District Court is the evidence of numerous witnesses who were called to prove the antiquity, the extent and the value of the coir manufacture and traffic, in the course of which these husks are deposited to rot in these pits. For reasons already given, we think that this is irrelevant under a prosecution under this part of this Ordinance.

All these matters, as to the coir trade, and the population employed in it were matter for the legislature to consider before they passed this Ordinance. We have no doubt that they were considered, and that this part of the Ordinance was expressly designed to stop the further burying of coir in the very pits in this neighbourhood. But be this as it may, the duty of the judicature is to administer laws, not to make them, and not to annull them by refusing to convict under them when cases are clearly proved And we shall reverse the judgment of the District Court accordingly. There is no need on this occasion to pass more than a nominal sentence so as to be a judicial warning that the practice of depositing coir in these pits must be discontinued.

19th July.

D. C. Colombo, No. 25,396 / 23,896. *Joronis Appu* v. *Baba Appu.*

Minor—trader—his liability on contract.

The decree of the court below was set aside, in these terms :—

In this case the plaintiff seeks to recover £2 10s. paid in advance to the defendants for 300 bundles of straw which were never delivered. Both the defendants plead a general denial and the second defendant (son of the first defendant) also pleads his minority. The court below exonerating the first defendant from the contract, nonsuits the plaintiff on the ground that the second defendant being a minor, is not liable, quoting Vander-

1864. July, 22. — linden, page 96. The Supreme Court however is of opinion that it having been proved that the second defendant was openly engaged in trade, and that the payment in question arose out of that trade, his minority is no plea to the action, the law considering that, if a man has understanding and experience enough for commerce, he may safely be left to his own protection in the ordinary concerns and dealing of life. (Cf. D. C. Negombo, 854, February 7, 1835, *Morgan's* Reports p. 32, and *Marshall* pp. 421 and 422).

22nd July.

Present :—TEMPLE, J., and THOMSON, J.

D. C. Colombo, No. 36,919. } *Volkart Brothers* v. *Hoffman*, et al.

Sequestration—practice—R. & O. section 15, p. 64.

The sequestration obtained in this case by the plaintiffs was dissolved by the Supreme Court in the following judgment :—

This is an action for a debt upon the common money counts and upon the defendants being reported not to be found, a writ of sequestration was issued under Rule 15 of Rules and Orders, section 1 of 1833, against the defendant's property. The application for sequestration was supported by the affidavit of one Frederick Augustus Plump, who states therein that he is the agent and attorney of the plaintiff's. The proctor of the attorney of the defendants moved that the writ of sequestration be dissolved, on the ground (amongst other reasons) that the affidavit on which the sequestration was granted is not sworn to by the plaintiffs, or either of them, and that there has been no statement by the plaintiffs, or either of them, as required by the Rule 15 of the Rules and Orders of 1833, section 1. These two points which are substantially the same, were the only points relied upon in the argument before this court. On these points the court below says "the writ of sequestration was issued in conformity with the uniform practice of that court and, having regard to the construction so long put upon the 15th Rule, that court is not prepared, in the absence of express authority to the contrary, to hold that the requirements of the Rules is not sufficiently met where plaintiffs are not residents in the colony by the necessary affidavit being sworn by their duly constituted attorney."

Even were the court to accept this as law, we are of opinion that this judgment is not founded on legal evidence. It is no where in the case proved that the plaintiffs are non-residents, and even if

we take that as admitted, the affidavit of Mr. Plump is substantially defective, in as much as it does not shew how Mr. Plump (a person not the plaintiff) knows that the defendants are indebted to the plaintiffs. Were he the plaintiff, the affidavit would be sufficient, for of course the plaintiff is taken to know his own affairs. For all this affidavit shews, Mr. Plump's knowledge may be mere hearsay, and he ought to have stated that he knew it of his own knowledge, if he was in a position to do so : this is what he would have been bound to do in a *viva voce* examination, and such an affidavit as this cannot be less precise than *viva voce* evidence. He might have laid a foundation so as to make his statement evidence, by an inducement shewing his personal knowledge of the transactions in question, but this he has not done. On the points of law the court below is not guided by the words of Rule 15, but by a construction put upon it as alleged under an uniform practice of that court. The practice under that Rule has never been called in question before us, but, with all respect to the practice of the court below, it may safely be asserted that that practice can only be taken as a guide by this court where anything latent or unprovided has been or has to be dealt with, and not when the Ordinance or Rules and Orders regulating practice are express and explicit.

We are of opinion that on this question the Rules and Orders are express and explicit, and that this court must construe Rule 15, according to the usual rules for construing written law. Rule 15 says (in case of the Fiscal returning to a summons or warrant that the defendant is not to be found), "if the plaintiff shall *by his own* "*statement*, subject to punishment and action in case of his making "a false statement, as provided by the second Rule, verify his de-"mand to the satisfaction of the court, a mandate of sequestration "shall on the motion of the plaintiff, issue to the Fiscal, &c."

The words *his own statement* must be taken (according to the golden rule) in the plain ordinary meaning, unless absurdity or manifest injustice will follow therefrom ; and indeed according to some authorities, the court cannot modify such plain and unambiguous words as these, even if manifest injustice would follow ; or if the court is bound to modify these plain words, it can only do so, so as to avoid something which could have been the intention of the framer of the Rules. If the court so modifies these words as to admit an agent's statement to be the same as the principal's own statement, would it by such modification avoid something which could not be the intention of the framer ?—it has not been shewn, and does not appear on the face of the Rules, that it could not have been the intention of the framers that the plaintiff should not, in all possible cases, supply his own knowledge.

This court has in another case said that it could not have been

1864. July, 22. — the intention of the framers of the Rules, that the Queen's Advocate who is the official plaintiff for the Crown, should swear to that of which he cannot have personal knowledge, but would modify the rule so as to bring in the active principal in the Queen's Advocate's stead ; and no doubt this court would also, in an action for example by one of the banks in this town, accept the affidavit of the manager. But in these modifications the court only substitutes the real practical plaintiff for the official plaintiff, and plainly carries forward the purposes of the rule (D. C. Galle, No. 14,358, July 9th, 1950). These cases proceed on the principle "that the "court having satisfied itself that all the essential requirements "have been complied with as far as is compatible with the circum- "stances of the case, will not allow the want of an exact com- "pliance to prevent a party from obtaining his just rights in a "case where such compliance is impossible."

Now it is impossible that the Queen's Advocate can ever know of his own knowledge that which the Crown Agents do, without the Queen's Advocate's privity. And it is impossible that the Oriental Bank Corporation can ever make an affidavit as plaintiffs, and thus a modification, or rather an extension of the words of the rule in such cases was necessary to carry out the purpose of the rule, and to obtain justice. But it is not impossible for a plaintiff resident at Calcutta, to make arrangements to swear an affidavit here, or in Calcutta itself, before some proper authority, or to give his statement before a commission, and thus no modification of the rule is necessary to carry out the rule. If under special circumstances, it should become finally impossible that a plaintiff could make his affidavit, even if he were in this very town, the affidavit of another in order to fulfil justice might be admitted, as if the plaintiff had become insane since the commencement of the suit ; but, the simple fact of the plaintiff's residence, in another country does not of necessity finally preclude the plaintiff in all cases and circumstances from bringing his own personal knowledge and responsibility before a court in this island, when he asks for this extra remedy. We think therefore that no necessary absurdity or injustice follows from refusing to include an agent's statement in the words the "plaintiff's own statement", when the plaintiff is merely non-resident in Ceylon, such as would follow in insisting on the nominal plaintiff's affidavit, when the crown, or a corporation, or an executor, or a guardian, or a curator are the parties sueing.

But if it could be shewn in any given case that the plaintiff's affidavit is finally impossible, the law would accept the oath of some one else : mere absence from the colony does not create finally and for ever such an impossibility, and as it is the duty of the plaintiff to supply all that the law demands of him to support his

rights, we do not think it is incumbent on us to stretch the plain simple words *his own statement* in this case.

We are supported in this view first, by the case No. 19,779, D. C. Galle, 20th March, 1861, where it was held that under the Ordinance No. 15 of 1856, a sequestration cannot be obtained where there is no affidavit made by the plaintiff himself, although, the plaintiff is resident out of the Island, and there is an affidavit of his agent who conducts the suit. That Ordinance, which provides for sequestration in the case of the defendant's absconding, uses the words, "the plaintiff shall by *his own* affidavit and examination if necessary &c," shewing the strong meaning given by this court to the words "his own." Secondly, the case of *Herschfeld* v. *Clark*, 22 L. J. Exch. 113, the Court of Exchequer refused to grant a discovery of documents under the 50th section of the Common Law Procedure Act, except upon the affidavit of the party to the suit, and refused the affidavit of the attorney of the party, the party himself being a foreigner and abroad. Yet the words of that act are not so strong as those of the Rule in question. We think ourselves bound in questions arising on this process to be particularly strict Sequestration, heedlessly granted, may be ruin to a commercial firm, and it has been said in 10,324, D. C. Colombo, No. 4, 24th November, 1863, that sequestration is a burdensome and expensive process which should not be granted unless under an imperative necessity.

August 4th.

Present :— TEMPLE, J., and THOMSON, J.

C. R. Kandy, No. 32,039. } *Perera* v. *Mudilihamy*.

Ordinance No. 7 of 1840 —"interest in land"— sale of coffee growing on the trees.

The following is the judgment of the Supreme Court :—

Plaintiff sued defendant to recover £10. Defendant purchased from plaintiff coffee growing on the trees standing in plaintiff's garden for £15. He paid plaintiff £5, but failed to pay the balance. Defendant denied having purchased the coffee, and pleaded that he was not liable to pay the amount claimed. The commissioner thought the case came under the operation of the 2nd clause of the Ordinance No. 7 of 1840, and plaintiff was nonsuited with costs.

The Supreme Court concurs with the commissioner in that opinion, the sale of crops of fruits such as coffee being a sale of an interest in land.

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August 4.

See D. C. Negombo, No. 10,286, 3rd July, 1845, and D. C. Ratnapura, No. 1096, 24th October, 1844.

C. R. Calpentyn, No. 20,144. } *Mohamado* v. *Ahamado*.

Lease—use and occupation—rent—damages.

The decree of the court below was ordered to be set aside and judgment to be entered for plaintiff for £7 10, to wit, for £4 10 for instalments of rent due under the lease, and for £3 for use and occupation since the expiration of the lease, together with cost of suit.

The following is the judgment of the Supreme Court :—

The Supreme Court is of opinion that the plaintiff has proved a *prima facie* case of title in him, and that the evidence of the defendant and intervenient was not in point of fact sufficiently strong to rebut that title, and that accordingly he can recover the instalments, and that as to the damages *ultra*, the plaintiff had a right to treat the defendant as a tenant at sufferance for the period during which he held on after the expiration of the lease, and to sue for use and occupation in respect thereof. *Bayley* v. *Brady*, 5 B. 406.

D. C. Kandy, No. 37,678. } *Findlay* et al. v. *Miller*. *Pieris*, et. al. claimants, appellants.

Writ of execution against person—arrest—payment into court—claim for concurrence.

Lorenz for claimants.

The following is the judgment of the Supreme Court :—

In this case the appellants claim concurrence in the proceeds of an execution against the person. The court below decided that there could be no concurrence for the proceeds of an execution against the person. The appellants contend that the species of execution does not matter, but that concurrence lies, whatever the nature of the execution may be, so long as the money has not been paid over, but remains subject to the orders of the court. It was certainly for the appellants to produce some authority for this assertion, which they have not done. The court has looked up the authorities however, and cannot find that this concurrence is ever granted except in cases of execution against property. The rights of concurrence is a privilege peculiar to the civil law, and the court cannot extend the right beyond the limits of the authorities, and accordingly decides that it finds no authority for granting concurrence in the proceeds of an execution against the person.

A debtor's property may be said to be pledged to all his creditors in return for the credit given, and therefore all are entitled in a certain order to share in it, but this does not apply to a payment under a personal arrest which is of a different nature. 1864. Sept., 14.

14*th September.*

Present:— TEMPLE, J., and THOMSON, J.

C. R. Kandy, No. 32,487. } *Duffy* v. *Waring.*

The commissioner found as follows :—

" This a suit to recover the value of a drake. Plaintiff is European hospital sergeant at Kandy, and, living near the lake, owns a brood of ducks. Between the hospital premises and those of defendant only a road intervenes, and there is free access to both. Both parties keep ducks and the ducks of both naturally frequent the portion of the lake adjoining the hospital premises. Decree—nature of—patriarchal justice,

" For the plaintiff it is urged that his drake abandoned his own brood on March 11th, and strayed away into defendants ducks. On the other hand, it is alleged that the drake has been in defendant's possession for a period long previous to the date named. The identity of the bird is pointedly sworn to on both sides.

" The court sees no reason to doubt that the evidence on both sides has been conscientiously given. Who then is in the wrong ? It is impossible to say. Drakes of the kind before the court may often resemble each other closely, and it is not only possible, but highly probable, that to each party a drake belonged very like the one in the possession of his opponent. In view of the fact that the broods were often together, it is likely enough that one of these drakes has been lost, and that the drake *now* in dispute is the survivor. The court cannot determine to whom such survivor belongs, and in view of the evidence on both sides, the only decision that can be arrived at is to adjudge that the drake in dispute be put to public auction and sold to the highest bidder, and that the proceeds be divided equally between the parties. Each party to bear his own costs."

Defendant appealed.

The Supreme Court set aside the decree in the following judgment :—

This is a claim for five shillings value of a drake which the defendant was alleged to withold from the plaintiff. The defendant pleaded the general issue. Three witnesses were examined for

1844.
Sept., 14.

the plaintiff and two for the defendant. The drake was adjudged to be put up to public auction and sold to the highest bidder, and the proceeds to be divided equally between the plaintiff and defendant. This is not a judgment. The commissioner's duty is to hear and determine, and this judgment determines nothing. Such a form of decree may suit the Arabian Nights' Entertainment, but is not agreeable to the prosaic character of the Court of Requests. The commissioner had a simple rule of law to guide him, that is "that the plaintiff must recover by the strength of his own title." If therefore it turns out in evidence that the defendant has a title at least equal to the plaintiff and that the defendant is in possession, the plaintiff will not have known the superiority of title entitling him to recover.

D. C. Galle, No. 21,028. } *Jayawardene* v. *Aberan.*

Defamation—English Law—Roman Dutch Law.

In this case the nonsuit which the court below had entered was set aside, and judgment given for the plaintiff for £2 and costs; and the Supreme Court observed,—

The court below has entirely mistaken the law in this case. Defamation is maliciously publishing either by word of mouth, by writing, by printing, or by pictorial or other representation, either in his presence, or his absence, publicly or secretly, any thing whereby a person's honor or good name is injured or damaged. *Grotius*, bk. 3, cl. 26, sec, 2; *VanLeeuwen*, bk. 4, c. 37, sec. 1. *Vanderlinden*, bk. 1, c. 16, sec. 4, *Vanderkeesel*, sec. 802; *Marshall*, 402.) This definition includes the whole English law of slander and libel, both with and without special damage, and more, because it guards the honor which the English law does not.

To call a man a "whore's son" is defamatory to his honor (*Marshall*, 413; and No. 2507, C. R. Calpentyn, 20th October, 1846, *Nell*, 103,) but as such words did not in this case actually impute, nor were intended to impute, base birth to the defendant, and the word "rogue" used was only a vague imputation of dishonesty not having reference to the baseness of the person defamed, the court will only give small damages and costs.

11th October.

1864. October, 11.

Present:—CREASY, C. J., and TEMPLE, J.

D. C. Kandy, No. 40,612. } *Annamalai* v. *Casim.*

Practice—motion for judgment—defendant in default—appearance by counsel.

On a motion for provisional judgment, the court below allowed it on the ground of defendant's default to appear, though his counsel appeared and denied his signature.

The Supreme Court set aside the order in the following terms, without prejudice to any fresh application which the plaintiff may make :—

We have ascertained that according to the general practice, when a proctor or advocate appears for the defendant and denies his signature, such denial is treated as a denial made by the defendant. The course then is not to make the order as on default, but either to take the plaintiff's *ex parte* evidence of the signature at once, or to appoint a speedy day in which the plaintiff may give such evidence. The decision in the court below was a decision that provisional judgment should be ordered on account of the defendant's default, and that no evidence on the part of the plaintiff was necessary. This the Supreme Court thinks erroneous and sets aside the order.

C. R. Colombo, No. 29,447. } *Fernando* v. *Pieris,* et al.

Pro. note—undertaking to pay debt of another—stamp—evidence.

The following is the judgment of the Supreme Court :—

In this case the plaintiff sues to recover £4 and one shilling, which he alleges to be due to him on a promissory note of the first defendant, by which he, the first defendant, agreed to pay that sum by weekly instalments of two shillings; and which the plaintiff claims from the second defendant also, the second defendant having at the foot of the promissory note undertaken to pay those instalments so long as the first defendant continued in his service.

The Supreme Court is of opinion that the commissioner was right in considering that the undertaking of the second defendant, written on the promissory note of the first defendant, was not liable to duty as a promissory note, but was only liable to the duty (if any) which would attach to it as an agreement. But we think that he was wrong in considering that any duty did attach to it as an agreement, and in rejecting it in evidence for want of a stamp.

According to part i of the schedule to the Ordinance No. 11

1864. Dec., 2. — of 1861, an agreement of the value of £1 and not exceeding £5, requires a stamp of 3d. No stamp therefore is required on an agreement under £1 ; and the undertaking of the second defendant does not positively bind him to pay a sum exceeding £1, as he could at any time have discharged the first defendant from his service, and then he, the second defendant, would no longer have been liable to pay anything.

The Supreme Court observes that a Stamp Ordinance, being a tax upon a subject, must be strictly construed, and that it must clearly appear that the subject matter of the agreement is of the taxable amount before the liability to the tax can attach ; and it is the amount to which defendant positively binds himself which determines the amount of the agreement in this respect.

The case is therefore sent back for the commissioner to find whether the first defendant is in the service of the second defendant and to give judgment *de novo* so far as regards the second defendant.

18*th November.*

Present :—Creasy, C. J., Temple, J., and Stewart, J.

D. C. Jaffna, No. 12,739. } *Mailvakanam* v. *Arumogam*

Thesavalamai —marriage— majority.

The judgment of the court below was affirmed as follows :—

The Supreme Court has deferred giving judgment in this case for some time because it wished to see the original record of an old case in the Wadamoratcy District Court, No. 2,419, which is briefly but quite correctly reported in *Morgan, Conderlag* and *Beling*, p. 301. That case decides that by Tamil law a young woman obtains majority at thirteen, and that she may then marry, even without the parent's consent.

In the case before us, the 4th defendant was clearly more than 13 at the time of the execution of the bond and of the marriage with the third defendant.

2*nd December.*

Present :—Creasy, C. J., Temple, J., and Stewart, J.

D. C. Jaffna, No. 13,405. } *Muttucoomaru* v. *Mahomadu.*

Pro. note— jurisdiction.

The decree of dismissal entered of record by the learned District Judge was set aside, and judgment ordered to be entered for plaintiff.

The following is the judgment of the Supreme Court :— 1864. Dec., 8.

The note as filed and referred to in the pleadings purports to be payable at Jaffna. There was therefore a cause of action giving jurisdiction at Jaffna. See D. C. Colombo, No. 34,542, January 26th, 1864, and D. C. Colombo, No. 18,709 reported in *Lorenz* 147.

8th December.

C. R. Harrispattoo, No. 12,665. } *Rakie* v. *Whitten.*

Evidence—withholding check roll—presumption.

On appeal by defendant, the order of the court below was affirmed in these terms :—

Mr. Whitten was not merely served as defendant with a notice to produce, but he received a subpœna *duces tecum* as a witness to produce the check roll ; and we are clearly of opinion that the document was one which he was bound not only to bring into court, but to produce in evidence when required. (See *Doe* v. *Date*, 3, Q. B. 609.) That case shews that the passage in Starkie on *Evidence*, vol. 1, p. 88, which speaks of a witness not being compellable " to produce title deeds or other documents where the production " might prejudice his civil rights," as only correct so far as regards title deeds, and documents in the nature of title deeds.

With respect to the effect which the withholding of the check roll ought to have on the case, we draw the commissioner's attention to the principle laid down in the notes to *Armory* v. *Delamirie*, Smith's Leading Cases, vol. 1, p. 261. " If a man by his own tor- " tious act withhold the evidence by which the nature of his case " would be manifested, every presumption to his disadvantage will " be adopted."

C. R. Kandy, No. 31,530. } *Coomarahenege* v. *Suramba.*

Land—owner and cultivator—claim for share of crop—Ordinance No. 7 of 1840—rights of cultivator to compen-

On appeal by plaintiff, the non-suit decreed by the court below was set aside and case sent back for further hearing, in these terms :—

This case has been abruptly stopped by the plaintiff, being nonsuited for want of a notarial agreement under the Ordinance No. 7 of 1840, the court below evidently considering that the plaintiff's right to recover depended entirely on his proving a contract between himself and the defendant, for the defendant to take land on certain terms and for the defendant to perform those terms.

1864. Dec., 8. — sation for work done.

The written pleadings on both sides are informal, but the pleadings in Courts of Requests cases are to be read together with the examination of the parties; and when these pleadings and examination are so read, it seems to us that the plaintiff, if his version of the facts be true, may have a right to recover, independently of any such contract as the Ordinance would affect.

The plaintiff in effect says that he, the plaintiff, put the defendant in as cultivator (not as tenant) of his, the plaintiff's lands, and that a crop was raised on his, the plaintiff's land, part of which the defendant wrongfully appropriated.

The plaintiff needs no aid from any contract to recover, if this be true; but the defendant denies it, and the commissioner should ascertain as to the truth of it, and decide accordingly.

The case No. 282, C. R. Kandy, referred to by the Commissioner in his judgment, is not to be understood as deciding that a man who has actually cultivated the lands of another and for that other's benefit, cannot recover any compensation for his work and labour. The examinations of the parties in that case shew that it was really brought to recover possession of land which the defendant had agreed to let the plaintiff possess for seven months, but out of which the plaintiff had been ejected at the end of four months.

The case of C. R. Caltura, No. 17,112 (see *ante* p. 83) shews very fully what right a landlord may have to recover for use and occupation without a notarial instrument, if there has been actual use and occupation, and the judgment of Mr. Commissioner Dickson in C. R. Kandy, No. 31,172 (to which we have been referred)* as to the rights of cultivators for compensation for work and labour which they have actually bestowed, is in our opinion, a sound and able exposition of the law on that branch of the subject.

C. R. Dambool, No. 3079. } *Siman Appu* v. *Kalloo Ettana.*

Kandyans—adoption by them of practices not Kandyan—effect of such adoption—marriage—inheritance.

This was a claim by plaintiff for a share of his paternal inheritance. The issue was whether plaintiff's father was married to plaintiff's mother. The District Judge found against plaintiff.

On appeal by him, the Supreme Court set aside the decree of the court below and entered up judgment for plaintiff as prayed for, as follows:—

The ancestors of the village community to which the parties

* See *Appendix* for Mr. Dickson's judgment.—Ed.

in this suit belong settled in the Kandyan country more than 200 years ago, and they and their descendants have adopted the Kandyan law, which must be regarded as the customary law, and according to which the courts must decide, in the absence of legislative enactment on the point in dispute, whenever questions arise between them on matters of inheritance, marriage, legitimacy or other civil rights (Marshall's Report, p. 381.) The applicability of the Kandyan law cannot be destroyed by the circumstance of some of the villagers having during the last half century given their marriage the additional solemnity of the marriage ceremony being performed by a Roman Catholic priest. This was a matter of choice and not of legal necessity, and this further solemnization cannot have been possible at the time of their first settlement under the Kandyan kings, or so long as Kandy was an independent kingdom.

1864. Dec., 8. —

The plaintiff's father legally married his mother according to the Kandyan custom, and the plaintiff is accordingly entitled to the share of his paternal inheritance assigned him by Kandyan law.

D. C. Kandy, No. 30,660. } *Silva* v. *Christian Appuhamy.*

Domicile—low country Singhalese—Kandyan law.

The following is the judgment of the Supreme Court:—

The Supreme Court thinks the decision of the District Judge as to the law of domicile was right.

The parties, though low country Singhalese by origin, had been long resident in the Kandyan province before their marriage; they were married in that province; and they continued to reside there until the wife's death, and the husband resides there still. He swears positively that he and his wife at the time of the marriage intended to reside permanently in the Kandyan territory.

The evidence on the other side does not go beyond vague and unsatisfactory generalities.

D. C. Kandy, No. 39,686. } *Findlay* v. *Findlay.*

Ordinance No. 5 of 1842—"succession"—husband and wife.

The decree of the court below was affirmed in these terms:—

We think the decision of the District Court Judge correct.

The argument for the appellants, who have denied the wife's right to any share at all, has rested entirely on a strict and literal construction of the words "inheritance and succession" in the 8th section of the Ordinance No. 5 of 1852. Such a construction would

1864. Dec., 15. — lead to this evident injustice and absurdity, that the wife would be stripped of the third which she would have had as a Kandyan wife, and yet not get the half which a wife would get under the Roman Dutch Law, because, strictly speaking, when the wife under the Roman Dutch Law takes her half on the husband's death, she neither inherits nor succeeds, but only takes that which in theory has always been hers, though in fact she had not a penny of it so long as the husband lived. She would according to this argument be left entirely destitute. This would be a manifest absurdity and injustice, and we do not feel compelled so to read the Ordinance. According to the rule laid down by Lord Wensleydale in *Perry* v. *Skinner*, 2 M. and W. 471, (cited and acted on by us on previous occasions), we construe the words of the Ordinance in their ordinary sense unless it would lead to manifest absurdity and injustice. In that case, we so far modified them as to avoid that which could not have been the intention of the legislature.

Putting a reasonable construction on the 8th clause of Ordinance No. 5 of 1852, we understand the word "succession" in it to extend to a wife's coming into possession of her moiety of the estate on the husband's death.

December, 13*th*.

Present :—Creasy, C. J., Temple, J., and Thomson, J.

D. C. Batticaloa, No. 13,633. } *Maartenz* v. *Casinaden*, et al.

The following is the judgment of the Supreme Court :—

If the first defendant had neither possession of the land, nor of the deed giving it to him, a strong presumption would arise that there had never been an acceptance of the donation, without which the title of the son cannot be upheld.

Gift, deed of —delivery— possession of land—presumption.

On looking into the pleadings in case No. 12,517 referred to by the District Judge, the Supreme Court finds the circumstances of that case to be as follows :—the plaintiff executed a deed of gift of the premises in question in favour of their son, under a writ against whom the defendant got the land sequestered. The plaintiffs admitted the execution of the deed of gift, but denied that possession of the land had ever been given. They do not expressly deny that possession was given of the deed, but it would seem from the replication that they imply as much. The court should in that case have heard evidence on this point, as the non-possession of land or deed would, as above stated, raise a presumption of non-

* In P. C. Kegalle 16,940, *Ramanathan's* Reports, 1860-62, p. 100.—Ed.

acceptance of the donation; and it was for the defendant to shew affirmatively such acceptance, without which no donation is complete. The Supreme Court sent the case back for the District Court to supply the omission on the point. 1864. Dec., 15.

Without possession (that is, under the circumstances, without acceptance of the donation which acceptance may be evidenced in various ways,—*Vanderlinden*, p. 215), the deed under which the defendant relied to establish the title of the son to the land which he, the defendant, had caused to be sequestered, could not be upheld.

The decree of the court below is set aside and case remanded for further hearing, and particularly as to whether the first defendant had possession of the deed.

15*th December*.

Present:—Creasy, C. J., and Stewart, J.

C. R. Colombo, No. 31,969. } *Francisco Pulle* v. *Avoo Lebbe*.

Pro. note—payment by maker to payee—right of maker to sue payee after paying endorsee.

The nonsuit entered by the Commissioner was set aside and the case sent back for further hearing and consideration, in the following judgment of the Supreme Court:—

The plaintiff's case seems to be that he paid the defendant two pounds and ten shillings upon a note, given by him to the defendant, which note, he, the plaintiff, supposed the defendant still to hold when that payment was made, whereas the defendant had endorsed the note away and concealed the fact of that indorsement from the plaintiff when the payment was made. The plaintiff's further case is, that the indorsee of the note sued him, the plaintiff, and compelled him to pay upon the note, without having the benefit of the payment to the defendant of the two pounds and ten shillings.

If these facts are true, the plaintiff is undoubtedly entitled to recover the two pounds and ten shillings from the defendant. (The law on this subject is admirably stated in the notes to *Merivale* v. *Hampton* in Smith's Leading Cases, vol. 2. pp. 332 to 340.) But the plaintiff ought to make these facts appear clearly, and not to leave his case in the confused and imperfect state in which he has placed it by merely examining the defendant.

1865.

5th January.

Present:—STEWART, J.

P. C. Negombo, No. 6,100. } *Ismail Lebbe* v. *Saibo Doray*, et. al.

(Ordinance No. 11 of 1868, clause 104)—binding over parties to keep the peace.

The first defendant in this case was charged with assaulting the complainant ; and the second defendant with aiding and inciting the first defendant to commit such assault.

The magistrate found them guilty, and sentenced each to pay a fine of £5, and to give security in £50 each to keep the peace towards the complainant for six calendar months.

On appeal, *Lorenz* appeared on behalf of the defendants appellants, *Eaton* for respondent.

The Supreme Court affirmed the sentence as to the fine imposed upon the defendants, but set aside the order as regards so much of the judgment as required the defendants to find security to keep the peace, and observed,—

The power given to police magistrates by the 19th section of the Ordinance No. 13 of 1861, to bind over both or either of the parties to keep the peace, is not cumulative, and cannot be exercised in addition to the ordinary punishment a Police Court may award. P. C. Jaffna, No. 6,021, June 4th, 1864.

The Supreme Court also notices that the defendants have been bound over for six months and in £50, the maximum time fixed by the Police Court Ordinance above referred to being only three months, and the amount £30.

10th January.

Present:—STEWART, J.

P. C. Negombo, No. 5,830. } *Silva* v. *Rodrigo*, et al.

Ordinance No. 4 of 1841, clause 3—act of vagrancy—adjudication.

The charge in this case is "for wandering in the village without any visible means of subsistence, though the defendants are persons able to maintain themselves by work or other means, in breach of the 1st and 4th sections of the 3rd clause of the Ordinance No. 4 of 1841."

The evidence showed that the first defendant had been recently discharged from jail, and went about in the country without work; that second defendant had some lands, and the first none; that both worked on the railway at one time, but subsequently refused to work for the complainant, when he called upon them to do so. 1865, Jan., 10. —

The magistrate thought that the evidence as against the second accused was not clear, and discharged him; but he convicted the first accused and sentenced him to fourteen days hard labour.

On appeal, *Alwis* appeared for defendant.

The Supreme Court set aside the conviction in these terms:—

The defendants are charged with "wandering in the village Lokelingamoa without any visible means of subsistence, &c., in breach of the 1st and 4th sections of the 3rd clause of the Ordinance No. 4 of 1841."

As repects the former of these sections, it is neither alleged in the plaint, nor is there any evidence that the first defendant wandered abroad to beg or gather alms as provided for by that section. And as regards the latter section, it is not alleged nor proved, that the defendant was unable to give a good account of himself.

Further there is no express finding of guilty against the first defendant, nor does it appear in respect of the breach of which clause he has been fined, the magistrate merely stating that "the first accused's vagrancy is clearly proved."

Breaches of different sections of an Ordinance ought not to be charged together; the offence against each should be separately alleged.

P. C. Chavagacherry, No. 5,331. } *Valoc* v. *Caderasar Udeyar.*

This was a charge against an Udeyar "for refusing and neglecting to grant the necessary schedule after seizure for the land called Itteady in the Writ No. 6,477 of the Court of Requests of Chavagacherry, and for having neglected forthwith to give a statement in writing of the ground of his refusal, in breach of the 3rd clause of Ordinance No. 1 of 1842." Ordinance No. 1 of 1842, clause 3—Udeyar's schedule—

The magistrate, after evidence taken and considered, dismissed the case.

On appeal, the Supreme Court set aside the order of dismissal, remanded the case to be proceeded with. It observed:—

The 3rd clause of the Ordinance No. 1 of 1842 renders a headman punishable for delaying to attend to any proper application for a schedule or for non-performance of any act in relation

1865. Jan., 26, — thereto which by custom he is bound to perform. See P. C. Chavagacherry, No. 17,584, 23rd November, 1858.

In sales of land upon writs of execution a deed of conveyance by the Fiscal is requisite.

P. C. Gampola, No. 15071. } *Mudehhamy* v. *Pieris*

Gambling—bagatelle board.

The defendants were charged with gaming and betting with a Bagatelle board, at the first defendant's shop, kept for the purpose of common or promiscuous gaming, in breach of the 19th clause of the Ordinance No. 4 of 1841.

On appeal against a conviction, the Supreme Court affirmed it

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January 26th.

Present :—Creasy, C. J., Temple, J., and Stewart, J.

C. R. Colombo, No. 29,876. } *Meera Lebbe* v. *Langenberg*, et. al.

Purchase and sale—warranty—latent defect—rescission of sale.

The following judgment of Commissioner Gillman sets out the facts of this case :—

" Defendants sold to plaintiff a chain and a ring, both parties at the time believing these articles to be of gold. These had been tested, in the morning before the sale, by a goldsmith employed by defendants; and plaintiff himself (who is a goldsmith) tested them at the sale, and both pronounced them to be gold. Defendants, moreover, at the sale, called on intending purchasers to 'satisfy themselves' of the genuineness of the jewelery ; and plaintiff heard this.

" These points are clearly established by the evidence, as is also the fact that these articles were not gold but so well gilt as to deceive any ordinarily careful and experienced goldsmith. Plaintiff appears not to have discovered this fact till the day after the sale.

"I think that, according to the principles of the Roman-Dutch Law, this sale must be rescinded, notwithstanding the fact of defendants calling on the parties purchasing to 'satisfy themselves,' because the defect was so latent that detection was impossible at the moment. The essence of a sale is the mutual consent of the buyer and seller, and 'this consent must be free and unrestrained, without the operation of fraud, *error*, or fear on either

'of the parties' (Vanderlinden p. 228); and a sale must be 'cancelled when the thing sold has such a defect that, if the buyer 'had known of it, he would have refrained from purchasing it' (Vand. p. 234), and Van Der Keessel (Lorenz's translation, sec. 642,) is to the same effect. 'As regards a latent defect in the 'thing sold, the action for rescission of the sale and re-delivery of 'the thing, or for recovery of the deficiency of value, may be main-'tained thereon.'

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" These authorities are clear and conclusive.

" (The plaint in this case had been amended on the 6th October last: and the plea that defendants acted as auctioneers only was not pressed at the trial.)

It is decreed that defendant do pay back to plaintiff the purchase money (£3 15 6), and that the articles be given back to defendants by plaintiff; and that defandants pay the costs of this suit.

On appeal, *Alwis* appeared for defendant appellant.

The following is the judgment of the Supreme Court:—

The Supreme Court thinks the judgment right on the authorities cited by the commissioner, and also on the authority of Voct, lib xxi, tit i, and on the authority of VanLeeuwen, *Censura Forensis*, iv. c. xix. 15.

These two authorities are very clear on the point that the purchaser's right to recover in such a case is not affected by the fact that the vendor was in ignorance, at the time of the sale, that the article was not that which it was represented to be.

In a case where the spuriousness of the article was so extremely difficult to detect as in the present case, the Supreme Court does not think that the plaintiff's right to recover is barred by the fact that he himself was a goldsmith by trade: *Voet*, in the chapter already referred to, section 9, p. 746, certainly says " Scientiæ autem emptoris simile habendum si emptor artifex fuerit." But he goes on to add " et secundum artis suæ præcepta scire facile potuerit atque debuerit vitium quod subest."

In the argument before us most reliance was placed, (and very fairly placed,) on the fact that the vendors told the purchasers to test the articles themselves. If the vendors had clearly and distinctly said: " these articles may be gold, or they may be some other metal—test them yourselves, and buy them on your own judgments whatever they may be,"—we should have held that this action was not maintainable in the absence of proof that the vendors knew for certain that they were not gold. But it seems to us what really took place was this. The rings were sold as gold rings, and the purchasers were invited to test them in such a

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manner as would lead the purchasers to use their own judgment as to the quality of the gold, and not as to the fact whether the rings were substantially gold rings, or substantially something else with a merely gilt surface.

P. C. Galle, No. 51,049. } *Bostock* v. *McMahon.*

Carriage Ordinance—[No. 17 of 1873, clause 14th sub-sec. (5)]—"let to hire"—proprietor and servant—act of servant—liability of proprietor.

This was a charge against the defendant for refusing to let his carriage on hire to complainant, against the 10th clause of the Ordinance No. 7 of 1848. It appeared in evidence that the complainant sent for a carriage from the defendant about 5 o'clock one evening, that the defendant sent up a carriage to Mr. Creasy's house, where, according to complainant's direction, it was to wait until he, the complainant, required it. After waiting at Mr. Creasy's for about an hour, the horse-keeper took away the carriage on the pretence of lighting the lamps, but never came back.

Upon these facts the Police Magistrate found the defendant guilty, and sentenced him to pay a fine of £1.

On appeal, *Eaton* appeared for the defendant appellant.

The Chief Justice delivered the following judgment, setting aside the conviction and sentence of the court below :—

In this case the defendant, the proprietor of a licensed palanquin carriage at Galle, was convicted for refusing without reasonable and sufficient cause to let his carriage on hire to the complainant. See Ordinance No. 7 of 1848, clause 10.

The main facts of the case were these :—

The complainant sent his servant to fetch a palanquin carriage which was to wait for at another gentleman's house. The servant fetched a palanquin carriage of the defendant, who is a regular letter out of such vehicles. After waiting a short time at the place appointed, the driver went away with the carriage, saying that he was going to fetch his lamps. The carriage did not return and the complainant was put to considerable inconvenience by the driver's conduct as above described.

There was no evidence whatever to show that the defendant, the proprietor, had any personal knowledge whatever of this particular transaction, or that he in any way authorized or sanctioned such or similar conduct on the part of the driver.

Two objections were made against this conviction.

First, it was urged that there had been no refusal to let on hire, inasmuch as the carriage had been sent to order.

We think this objection invalid.

"Letting to hire" means to let the hirer have the use of the carriage for such reasonable time, and in such reasonable manner, as the hirer may require. To withdraw the carriage before the expiration of a reasonable time from the person wishing so to have the use of it, is to refuse to let it to him; and on this point we think the conviction right. 1865. Feb., 17.

But the more serious objection remains, that in this case a master has been convicted for the act of a servant, without any evidence whatever to connect the master with that act, or to show that it was done by his direction or with his sanction, either express or implied. This appears to us to be against general principle. See *Smith's* Leading Cases, notes to *Lampleigh* v. *Brathwait,* p, 72, vol. 1, where the learned editors, (Justice *Willes,* and *Keating,*) speak of the rule of law that a master shall not be criminally responsible for the act of his servant, done without his knowledge or authority, as being an universal rule of law, with the solitary exception of the liability of a newspaper proprietor for libel, published by his editor without the proprietor's knowledge. See also the case of *Colburn* v. *Patmore,* 1 C. M. & R. 77, therein cited; and see the case of *Coleman* v. *Riches,* L. J. xxiv C. P. 125. The remarks of *Jervis,* C. J. at page 127 of that case are to be borne in mind when the case of *Attorney General* v. *Siddon,* 1 Crompt: & Jervis, p. 220, or that of *Rex* v. *Dixon,* 3 M. & S. 11, is referred to. These are the two cases which seem most in favor of this conviction, but we think that they only show that slight evidence may be enough to fix the master with penal liability for the acts of his servant. But in the case before us there is no evidence at all. The private knowledge which the magistrate may have of the general misconduct of carriage proprietors in such matters, cannot warrant a conviction. The legislature in England has by 6 & 7 Vict, c. 86, and other statutes made owners of hackney carriages liable to penalties for certain acts of misconduct by the drivers; but it is for the legislature to create such liability, if it think fit, and the courts cannot without legislative warrant extend the boundaries of criminal law.

February, 17th.

Present:—Creasy, C. J., and Stewart, J.

P. C. Calmone, Batticaloa, No. 7,172. } *Catherammah* v. *Sekunder.*

This was a complaint by a wife against her husband for leaving her without maintenance, so that she required to be maintained by others, in breach of the 3rd clause of Ordinance No. 4 of 1841. Maintenance—evidence of wife against husband.

1865. Feb., 17.

The complainant's evidence was taken and defendant found guilty. Against this judgment the defendant appealed.

Hay, appeared for the appellant.

The following is the judgment of the Supreme Court :—

The Court of Queen's Bench in England have recently decided that the wife is not an admissible witness against the husband in a charge under the 5 Geo. iv. c. 83 for desertion. See *Reeve* v. *Wood*, reported in the *Weekly Reporter*, vol. xiii, p. 154.

We feel it to be our duty to follow the decision, and to pronounce that the wife is not a legal witness against the husband on a charge under Ordinance No. 4 of 1841, section 3, clause 2, for leaving the wife without maintenance.

In the case now before us, there is no evidence beyond that given by the wife to prove the averment that the wife requires support from others, which is an essential part of the charge.

As the practice in this Island has hitherto been to admit the wife's evidence in such cases, we shall not reverse the police magistrate's decision, but we shall (under the 25th clause of the Police Court Ordinance) direct a further hearing, in order that the complainant may, if she is able to do so, produce legal evidence to prove this part of the charge.

The decision of the police magistrate is in other respects correct.

Case sent back for further hearing, on the sole point whether complainant required the support of others.

P. C. Galle, No. 51,227. } *Assa Muttu* v. *Mamuttu*.

Maintenance—Mahomedans—divorce—validity of plea.

This was a complaint by a Moor woman against her husband for leaving her without maintenance.

Defendant pleaded not guilty, and relied on the fact that he had been lawfully divorced from complainant.

A Mahomedan priest was called and stated in evidence—, "I made the three successive proclamations at my house, and gave notice to complainant. I granted the divorce according to our religious rites. This divorce is legal and binding. These proclamations are usually made at my house. The *maggar* was offered to complainant but she refused it, and it was left in deposit with one *Bawa* for the use of complainant. The maggar was £3. Such is the custom of the Mahomedans of Galle, and such divorce is legal and binding."

The head Moor man was also called to prove the divorce.

The Magistrate found as follows :— 1865. Feb., 17.

"I must consider that complainant has been divorced from "defendant according to the customs of the Mahomedans, as "proved by the priest and the head moorman, and however hard "may be the case of complainant, I do not think that I should be "justified in punishing defendant for refusing to maintain her "after the divorce. Defendant is acquitted and discharged. Com-"plainant is however advised to appeal, in order that the Supreme "Court should decide upon the validity of the divorce granted by "the priest and head moorman."

On appeal, the Supreme Court affirmed the verdict of acquittal in these terms :—

The Supreme Court thinks that on the evidence given before the Magistrate in this case as to Mahomedan divorce, his judgment was right.

P. C. Calmone, Batticaloa, No. 7,211. } *Cadera Umma* v. *Calendan.*

Maintenance—autre fois acquit—wife living on husband's credit—ability of wife to maintain herself—evidence—presumption.

The following is the judgment of the Supreme Court :—

The case is sent back for further hearing, and judgment. The present judgment of *autre fois acquit* is erroneous. The offence is a continuing one ; and a charge for leaving without support, during the month ending on the 17th of October, cannot be identical with a charge in respect of the month ending on the 21st of September. With respect to the other points, to which our attention has been called in this case, we think that, when a wife obtains full support by means of money borrowed on the husband's credit, proceedings cannot be properly taken against him as a vagrant for not supporting her. She, in truth, is making him to support her, and she ought not to be allowed to punish him by a criminal conviction at the same time, for not supporting her.

We also think that, when it is clear that a woman is in perfect health and strength, and without incumbrance, and that she can, if she pleases, obtain ample means to support herself, by work that is suited to her sex and to her past and present condition and habits, such a woman does not require the support of others within the meaning of the Ordinance against vagrant husbands. But the law, on this point, should be administered with great caution and humanity. The woman ought not to be required to prove ineffectual attempts to obtain employment, and we think that, in the absence of proof on either side, the natural and just presumption is, that a wife does require the support of her husband, and that when he wrongfully withdraws that support from her, the natural

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consequence will be to make her require the support of others within the meaning of the Ordinance. As we have already pointed out, such presumption is liable to be rebutted by proof of the wife's ability to maintain herself ; but such proof ought to be very clear, and the work by which she is to maintain herself ought not to be such as to impose any real grievance or degradation on her. We call the attention of the Police Magistrate to the recent decision* of this Court (following a decision of the English Court of Queen's Bench,) that the wife is no longer to be considered a legal witness against the husband in these cases.

February, 21*st*.

Present :—STEWART, J.

P. C. Jaffna, No. 7,270. } *Anthomal* v. *Philipps*.

Practice—absence of one of the accused—right of complainant to proceed or move for postponement.

This was a charge for assault. Summons were ordered against the accused returnable on 16th December last. On the 16th, the following order was made :—" complainant present—defendant absent—warrant to issue—case postponed to the 9th proximo." On the 9th " complainant present with second accused, first absent—no return to warrant. Warrant extended to first proximo." On the 1st " complainant and second defendant present. Parties not ready."

The magistrate dismissed the case, on the ground that the parties were not ready, though complainant's witnesses were all present; she felt herself justified in not proceeding, in the absence of the first defendant.

The Supreme Court set aside the order of dismissal and remanded the case to be heard. "It appearing that the absence of the first defendant against whom a warrant had been issued was the reason, and no fault of her own, why the complainant, who was present, was not ready to proceed."

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* See *Ramanathan's* Reports, 1860-62, p. 139.—ED.

February 28th.

Present :—STEWART, J.

P. C. Pangwille, No. 4,510. } *Ratamahatmaya* v. *Kolla.*

Ordinance No. 1 of 1844, cl. 1—lands boundary—evidence of demand.

This was a charge for wilfully neglecting to comply with a notice served upon the accused by the Government Agent, to produce certain documents, upon which he founded his claim to a certain land in breach of the 1st clause of the Ordinance No. 1 of 1844.

The magistrate found as follows,—

"The Kutcherry file produced in this case, shows that defendant was called upon to produce, within ten days from the 26th September, 1864, all deeds, documents, and instruments upon which he lay claim to the land called Maligayodelle. Defendant having failed to do this, this case was instituted.

"Defendant is adjudged to be guilty, and is sentenced to pay a fine of five pounds."

On appeal, the Supreme Court set aside the conviction and sentence, in these terms :—A Kutcherry file was only produced, but no proof given that a demand in writing from the Government Agent, requiring the production of the deeds referred to had been *served* on the defendant.

March 28th.

Present :—STEWART, J.

P. C. Pangwille, No. 3,914. } *Banda* v. *Appu.*

Ordinance No. 10 of 1844, cl. 33—arrack—removal of permit.

This was a charge for removing one gallon of arrack in *five vessels* (5 flasks), instead of in one vessel, as specified in the permit, in breach of the 33rd clause of the Ordinance No. 10 of 1844.

After hearing the evidence adduced, the Magistrate delivered the following judgment: "Although the permit says that the gallon of arrack was to be carried in one flask, I don't think it is of any importance, if it is carried in five: the only thing wanted is the quantity. Defendant no doubt found it more convenient to carry the arrack in five flasks. The defendant is adjudged to be not guilty, and is discharged."

On appeal, this finding was affirmed, the Deputy Queen's Advocate appearing for the complainant and not supporting the appeal as it was evident that no fraud was intended.

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April 4th.

Present :—Creasy, C. J., and Stewart, J.

P. C. Batticaloa, No. 7,467. } *Patuma* v. *Bawa.*

Maintenance —Mohamedans— divorce.

The complainant and accused in this case were Mahomedans. The charge was for maintenance in breach of the 3rd and 4th clauses of the Ordinance No. 4 of 1841. The defendant pleaded not guilty, and added "this prosecutrix brought a case against me under No. 7,349, in which I was fined 10s. for not supporting her properly. The court did not hold the divorce as a legal one, and said that I should take her to the mosque and there divorce her, and I have since done so, and paid her maggar, and the 10s. fine alluded to."

The magistrate found the accused guilty in these terms:— "The court holds that by the Mahomedan law of 1806, the divorce should be in writing and proclaimed once every week for three successive weeks in the mosque, and that the proper maggar, £2 10, should have been paid. It also holds that a woman, five months gone with child, is not in a fit state to support herself.

On appeal, the Supreme Court affirmed the conviction, as follows:—The defendant failed to prove that he had legally divorced complainant. Even if he had duly divorced her, he would, according to the 96th section of the Mahomedan Code of 1806, be bound to maintain her during her pregnancy. There is sufficient evidence in this case irrespective of the wife."

P. C. Ballepitty Modera, No. 28,118. } *Toll Keeper* v. *Silva.*

Toll Ordinance— evading payment of toll.

The following is the judgment of the Supreme Court:—

The defendant is charged with evading the payment of toll, in breach of the 17th clause of the Ordinance No. 22 of 1861.

The evidence shows that the defendant, who is a clerk in the Ballepitty Court, drove his hackery up to about 10 or 15 fathoms from the toll-bar; there he got down, and without paying toll, walked over the bridge to the court house which is close by; and in the afternoon that he re-crossed the bridge, to the spot where he had left his vehicle and drove home.

The Magistrate was of opinion that the charge was not maintainable, and we think the dismissal correct.

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The tolls imposed by the Ordinance are expressly declared, by the 4th clause, " to be levied in respect of the roads, bridges, ferries and canals specified in the schedules A. B. C. and D." The bridge at Ballepitty is included in schedule B. But it is admitted that the vehicle passed neither bridge nor toll bar.

The first portion of the 17th clause is inapplicable. The latter part, within the operation of which it is sought to bring this charge, enacts "that if any person shall do any other act what-" soever in order to evade the payment of any toll, and whereby the " same shall be evaded, shall be guilty of an offence."

The above provision is similar to that in sec. 41 of 3 Geo. 4, c. 126. In the statute, however, in addition to the restrictions contained in the preceding portion of the 17th clause, there is the following passage, " or shall leave upon the said road any horse, " cattle, beast or carriage whatsoever, by reason whereof the pay-" ment of any tolls or duties shall be avoided or lessened," words not occurring in our Ordinance.

Further, the 19th clause prohibits goods brought upon any animal or vehicle to any bridge, &c., to be transferred from one side thereof to the opposite. There is no provision, however, affecting such an act as the one now complained of, and consequently it may fairly be held that the present is a case in which the rule of construction, *expressio unius et exclusio alterius*, should be allowed to prevail.

P. C. Jaffna, No. 8,008. *Ambalavanen* v. *Vety.*

Sentence—previous commitment by a justice—power of Police Court to defer imprisonment till expiration of previous sentence.

The complainant in this case charged with assault a prisoner in the jail of Jaffna, who was undergoing imprisonment for default of finding security to keep the peace.

On a plea of guilty, the Police Magistrate sentenced him to "a month's imprisonment at hard labour, to take effect at the expiration of the committal under which he is now in jail."

Thereupon a lengthy correspondence ensued between the Fiscal, the Magistrate, and the Deputy Queen's Advocate of Jaffna in respect of the sentence passed, and the following letter, which terminated the correspondence, was addressed to the Fiscal of Jaffna, by the Police Magistrate.

Sir,—With reference to your letter No. 18 of the 30th instant, I have the honor to state that on reference to the original case, I find that the words objected to by you form a part of the sentence as recorded.

1865. April, 4. "As all sentences once pronounced are unalterable, and I have not "the power to alter it of my own authority (*Vanderlinden*) p. 545), I am unable to accede to your request.

Without expressing any opinion on the point raised by you, I must at the same time mention, that so far from "the words (in question) being used as a matter of course," it was my deliberate intention to keep this man a month longer in jail, and not merely to add hard labor to the remaining portion of his imprisonment under the former committal.

I have &c.

E. ELLIOTT,

P. M.

Since writing this letter, the man in question has at my recommendation appealed to the Supreme Court.

On appeal, the Supreme Court affirmed the sentence with the modification, that the term of imprisonment do date from the day of sentence, to wit, from the 20th day of March, and observed,—

The defendant was sentenced to a month's imprisonment at hard labor, to take effect from the expiration of the committal under which he was then in jail, which was a committal by a justice of the peace for default of finding security to keep the peace.

A committal of a party by a justice of the peace for default of finding security to keep the peace, cannot, in the opinion of this court, be regarded as such a judgment that a sentence of imprisonment by a police court may legally be deferred, until the expiration thereof.

A judgment of imprisonment against a defendant, to commence from and after the determination of an imprisonment to which he was before sentenced for another offence, is good in law. See *Rex* v. *Wilks*, 4 Burrows 2,577. But the committal alluded to in the case before us is not in the nature of a sentence, nor for an offence, the defendant being at liberty to obtain his discharge at any moment by giving the required security.

P. C. Pangwille, No. 4,842. *Meydin* v. *Palaniandy.*

[Ordinance No. 16 of 1865, cl. 77] —resisting police officer in execution of duty.

This was a charge for resisting and obstructing a police officer in the execution of his duty, in breach of the 60th clause of the Ordinance No. 17 of 1844. Plea not guilty.

The accused in this case who was a kangany on an estate, was ordered by his master to leave the estate, and on refusing to do so, the complainant, a police constable, was requested to turn him out, when defendant shoved the complainant by the breast; hence this charge.

The Magistrate found as follows :— 1864. April, 25.

"With reference to the mere fact of the obstruction, I am of opinion there is sufficient evidence: but it appears also to me that the complainant was in the discharge of his duty. The superintendent had authority to order the kangany off the estate: and the constable was performing his duty in the enforcement of such order. If delay had been caused by a reference to the court of Pangwille for a summons, a day at least would have elapsed—and serious damage might have resulted both to property and person. Under these circumstances, I adjudge the defendant guilty, and by virtue of the 60th clause of Ordinance 17 No. of 1844, defendant is sentenced to three months' hard labour."

On appeal, the Supreme Court set aside the conviction and sentence, in the following terms :—

"This is a charge specifically for breach of section 60, Ordinance No. 17 of 1844, which provides for the case of the resistance or obstruction of an officer of police, "in the exe-"cution of any duty or authority imposed upon or vested "in him by this Ordinance." The evidence shows that the complainant was not performing any duty requested of him by the Ordinance referred to, but that he was resisted whilst endeavouring, at the request of the superintendent, to turn the defendant out from an estate on which he had been employed as a kangany but which he would not leave. The plaint does not contain a charge of assault.

April, 25*th*.

Present:— Stewart, J.

P. C. Kandy, No. 61,135. *Kiriya* v. *Muttuwa*.

Theft—robbery—appeal—[Ordinance No.11 of 1868, cl. 108]—"staying the execution."

This was a case of assault and theft. The Magistrate fully believed the evidence for the prosecution, and sentenced accused to three months' imprisonment at hard labour.

While the prisoner was undergoing his sentence, his counsel lodged a petition of appeal, and moved that, pending the decision of the Supreme Court, the prisoner be admitted to bail. The motion was allowed and,—

On appeal, the Supreme Court delivered the following judgment :—

There is ample evidence to support the conviction. As regards the objection of want of jurisdiction in the Police Court, it

1865. May, 13. — appears to the Supreme Court that the evidence discloses only a case of theft and not of robbery. The box was not taken by violence, but was handed by the complainant to the defendant, who ran away with it. The subsequent scuffle and assault cannot be held to change the character of the original taking, and to make the offence one of robbery—*R.* v. *Gnosil*, 1 C. and P. 304.

The magistrate was quite right in considering that it was in his discretion to stay the execution of the sentence of imprisonment notwithstanding that it had commenced, upon the defendant appealing within the prescribed period. To construe the 24th clause of the Ordinance No. 13 of 1861 otherwise, would in effect be requiring the party to appeal forthwith, and in a large majority of cases, to render the *ten days* time allowed next to nugatory. Besides, there is nothing in the words "staying the execution" in themselves to imply that the imprisonment should not have commenced in order to secure to the appellant the benefit of the provision. Whether the imprisonment had begun or not, it would in either case be equally a staying or stopping the execution of the sentence.

13*th May.*

Present:—Stewart, J.

P. C. Badulla, No. 9,491. } *Maingay* v. *Kadera* et. al.

Labor Ordinance—notice to quit—subsequent waiver of such notice.

The following judgment of the Supreme Court fully sets out the facts of the case :—

This is a charge against the defendants, who are described as coolies employed on the Otumbe estate, for refusing to attend to their work on the 1st April last, in breach of the 7th clause of Ordinance No. 5 of 1841.

The evidence discloses that the defendants had been employed as coolies on this estate up to the end of March preceding, that not satisfied with their kangany, or for some other reason, which it is immaterial to consider, they desired to leave ; and that their proctor, in pursuance of instructions received from them, posted on the 16th or 17th March, a notice to the complainant, informing him of "their intention of leaving the Otumbe estate on the 1st April." The defendants left the estate on the 3rd April, having done no work from the end of March. Three points are referred to in the judgment of the police magistrate.

1st.—The sufficiency of the notice, it not having been given by the defendants themselves, but by their proctor.

2nd.—Whether the notice reached the complainant within the prescribed time ; and

3rd.—Whether the defendants, by continuing on the estate until the 3rd April, waived their notice. 1865. May, 13.

The two first points were urged by the counsel for the prosecution. The magistrate considered the notice sufficient, but came to no direct conclusion on the second question, it appearing to him on the third point that the defendants, by remaining upon the estate, virtually cancelled their notice, and accordingly he found them guilty of the charge.

The Supreme Court concurs in the opinion that the notice was sufficient. The second clause of the Ordinance requires that a week's previous notice or warning be given by either party to the other, &c." There is nothing however making it imperative that such notice or warning should be given by the parties themselves; and so it was determined by this court, collectively, in Kandy, P. C. No. 54,780, November 6th, 1862, that "the notice to quit (signed by a proctor,) given in the name of the kangany and by his authority, was good so far as he himself is concerned." In the present case, the notice was given by the proctor conformably to instructions from the defendants, and it must therefore be regarded as emanating from them.

The Supreme Court considers that the direct evidence, and the circumstances as proved, show that the notice must have been, and must be taken to have been, received in due time. The magistrate, as already noticed, has given no express decision on this point, though observing "that there does seem considerable doubt as to the date on which the notice reached complainant's hands."

It is besides remarked in the judgment that there is no direct postal communication between Badulla and complainant's estate, and the notice would therefore only have reached him when by an accident he might send to the post office for his letters.

There is no evidence as to how and when complainant's letters were forwarded to him: whether he was in the habit of sending for them daily or at intervals. We have however the fact that the notice was delivered to the postholder of the town on the 16th or 17th March, and also the strong and suggestive circumstance that if the notice had reached the complainant even a week afterwards, it would still have been in time.

The complainant admits having received the notice, but does not fix the date. He states: "a notice was sent to me from Mr. Orloff proctor, intimating to me that the kangany and defendants would cease to work from the 1st April. The names of the coolies appeared in the notice, but the notice was not signed by them. I received the notice towards the end of the month. I received it much later than the 16th March, about the end of March."

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Here it is to be remarked that the complainant does not allege that he did not receive the notice until after the 24th, up to which day it would have been within the prescribed time.

The second witness for the complainant says on this point in cross-examination, "about the middle of March, complainant said that he received a written notice from defendants that they would leave the estate on 1st April. I can't say what day of the month complainant told me this. It was less than fifteen days before the end of the month that complainant told me he had received this notice."

Looking to the tenor of the above examinations, it is impossible to come to the conclusion that the notice did not reach in time; and coupled with the circumstance of the complainant not only positively declaring its non-receipt before the 24th, and the long interval from the 17th, the natural as well as legal presumption, is in favor of the notice having reached its destination in due time.

It remains for the court to consider—whether the defendants, by remaining on the estate for two days, waived the notice that they had previously given.

The magistrate holds that "providing house, room, and shelter, for coolies by their employer, is to be considered as remuneration for their services, equally with the wages in money which they may receive." On this point however there is no evidence, all that is stated being as follows :—"the defendants were on the estate on the 1st and 2nd instant, but did not work." The second witness adds "they refused to go to work, and left the estate on the 3rd instant."

But supposing that the defendants continued to occupy the lines for two days, which probably was the case, it cannot, in the opinion of this court, from such circumstances, be fairly and reasonably inferred, that they intended to abandon their previous notice, they agreeably to that notice not merely not working, but actually refusing to go to work.

If the requisite notice had not been given, doubtless, as held by the Supreme Court in Newera Ellia, P. C., No. 4,927, "as soon as a day of the last week of the month had passed, the parties must be taken to have renewed the contract for the following month." It is unnecessary for the purposes of this case to decide whether under the Ordinance a week's previous notice does not absolutely put an end to the contract. But granting that it does not, unquestionably where formal and sufficient notice has been given in writing of the intention of a master or servant to determine the contract, strong evidence of the subsequent intention to abandon the notice (much stronger than that afforded by the equi-

vocal circumstance of coolies remaining two days without working, after the expiration of the term,) and proof of the operation of such change of conduct on the other party, will be necessary to render the notice nugatory.

It appears to the Supreme Court that the defendants were entitled to leave the Otumbe estate by virtue of the week's previous notice given to the complainant. And it is accordingly decreed that the judgment of the police court be set aside, and the same is hereby set aside, and the defendants are severally adjudged not guilty."

May 23rd.

Present:—STEWART, J.

P. C. Pangwille, No. 4,890. } *Menikay* v. *Baya*.

Maintenance—demand for.

This was a charge for maintenance.

After evidence taken and considered, the Police Magistrate dismissed the case for want of evidence. On appeal, the order was set aside and case remanded for further hearing and judgment in these terms :—

There is distinct evidence that the defendant refused to maintain his child in April, and the evidence would also appear to show that he neglected to maintain the child within the requisite period before the institution of the plaint. No previous demand is absolutely necessary, if the defendant leave his child without maintenance whereby it becomes chargeable to others.

May 30th.

Present:—STEWART, J.

P. C. Batticaloa, No. 7,493. } *Sarah Natchia* v. *Ibrahim*.

Maintenance—ability of wife to maintain hereself—duty of husband—procedure—evidence.

The accused in this case was charged with not maintaining his lawful wife, so that she required to be supported by others, in breach of the 3rd clause of the Ordinance No. 4 of 1841. Plea, not guilty. The complainant, in answer to a question put by the court, stated: "I have no children, never had any, and am not in the family way. I am young and healthy, suffering only a little at present with dysentery, but I am qnite able to work, although I am not accustomed to work as a cooly."

1865. May, 30. — The Magistrate without hearing the complainant's witnesses, delivered the following judgment :—"The woman is quite able to support herself; she is young and evidently perfectly healthy, and if she does not work for herself, I shall certainly not compel the accused to support her. The accused is discharged."

On appeal, the Supreme Court remanded the case for hearing, in these terms :—

The complainant ought to have been allowed to call her evidence, which it would appear she had not an opportunity of adducing, the charge having been dismissed by the magistrate after the evidence of a witness called by himself. The evidence moreover of this witness does not support the conclusion arrived at by the Police Court. To justify the dismissal of the charge, it will be necessary that it should be made clearly to appear that the complainant is in health and strength, and able to support herself by work suitable to her past and present condition in life, and that such work was readily attainable.

The magistrate should bear in mind that it is the duty of the husband to maintain his wife, and as remarked by this court in P. C. Batticaloa, No. 7,211, (17th February, 1865,) the law on this point should be administered with great caution and humanity, and in the absence of proof on either side, the natural and just presumption is that a wife does require the support of her husband.

P. C. Matara, No. 43,613. } *Baban* v. *Silva*.

Ordinance No. 10 of 1844 cl. 36, fine—discretion of magistrate.

The defendant was charged with refusing to grant a permit to complainant for the removal of 155 gallons of arrack from a distillery, in breach of the 33rd and 36th clauses of the Ordinance No. 10 of 1844.

The Magistrate found the accused guilty, and sentenced him to pay a fine of £1.

On appeal, the Supreme Court affirmed the conviction but modified the punishment in these terms :—

The 36th clause of the Ordinance No. 10 of 1844 leaves the court no discretion as respects the amount of the fine.

It is accordingly adjudged that the judgment be altered, by the defendant being sentenced to pay a fine of £5.

P. C. Matara, No. 43,806. } *Kino* v. *Don Soose.*

1865. June 1.

Maintenance.

The following is the judgment of the Supreme Court :—

The complainant charged the defendant "with leaving his children without maintenance so that she (the mother) requires to be supported by others."

The defendant is not obliged to maintain the mother of his illegitimate children.

The charge is also defective in not setting out the time when the offence was committed.

C. R. Colombo, No. 34,064. } *Fernando* v. *Morey.*

Claim in execution—fraudulent sale.

The plaintiff in this case alleged that on the 8th of December, 1864, he purchased from Captain Cooper, master of the ship "Estrange," for £3 10, a boat, with the oars all complete. That the defendant, by virtue of a writ of execution issued against the said Cooper, caused the said boat and oars to be seized and taken in execution, by the Fiscal, under the writ No. 3,305, C. R. The plaintiff amended the plaint, and prayed that the sale by the Fiscal under this writ be cancelled, and set aside.

The defendant pleaded that before, and at the time of the seizure, the boat was the property of Captain Cooper, and as he lawfully might, he caused the same to be seized.

The commissioner found as follows :—

The prayer of the plaint, as amended, is, that the sale of a boat by the fiscal under defendant's writ be set aside, plaintiff claiming the boat as his own, by right of purchase, from defendant's execution debtor, eleven days (as is alleged) before the seizure of the boat. Defendant has recovered judgment against his execution debtor the month previously. I think, under the circumstances of this case as appearing in the evidence, that it is extremely unlikely that the alleged sale of the boat to plaintiff was a *bona fide* transaction ; but apart from this consideration, I hold that the court has no power to cancel the sale by the fiscal. The seizure of the boat and its sale by the fiscal have been conducted in strict accordance with the provisions of the Rules and Orders of 11th July, 1840 ; and these rules lay down the steps, which the claimant of any property, about to be seized, or sold by fiscal, should take, in order to stay such seizure or sale, and they ordain that these shall not be stayed unless those steps be first taken. Plaintiff had taken no such steps, and I hold that this precludes him from seeking to set aside in court the seizure and sale.

1865. June, 6. — " Plaintiff's claim is dismissed, judgment for defendant with costs."

On appeal, the Supreme Court affirmed the decree of the court below, being of opinion, that the sale to the plaintiff, after the issuing of the writ, was a fraudulent sale, and the more so, as the plaintiff did not take possession of the boat.

June 6th.

Present :—Creasy, C. J., Temple, J., and Stewart, J.

P. C. Pangwille, No. 6,009. } *Baillie* v. *Perera*, et al.

False imprisonment—what is.

Plaint :—That the defendants did assault the complainant and forcibly and unlawfully keep, detain, and did falsely imprison the complainant, against his will for the space of about two hours.

Plea " not guilty,"

Mr. Baillie, sworn, stated :—On the 17th March, I was on the road accompanied by Mr. Mayo. I had a dispute with the Madawelle toll-man, who with others excited the passers by, and prevented my proceeding towards Kandy. I can recognize all but the second accused. I had given my name and address. I was obliged to turn out of my road and come up towards Pangwille. The accused said I must come to Pangwille that they might make their complaint. I was escorted by a sub-officer of the Ratamahatmeya's. We were not held. The horse was held. I was detained at least one hour. Mr. Mayo was witness of all that took place at the bar. I was not myself detained by any person. I attemped to pass but was not permitted. I was prevented by my horse being detained. The first and last were positively engaged. I saw the third instigating. I gave my address to the third. This detention was after the assault.

[The second defendant is discharged.]

Mayo, sworn, stated :—I was with Mr. Baillie on the 7th March, I recollect the disturbance. Mr. Baillie was detained about two hours. He was proceeding to Kandy. I was in the bandy all the time. The native seized the reins. I identify the third accused. Mr. Baillie turned to Pangwille, and I went on to Kandy. Mr. Baillie could not have proceeded. The horse and horsekeeper were held ; there were others.

Cross-examined. I saw Mr. Baillie give his name.

On appeal against a conviction, *Ferdinands* appeared for the accused.

The following is the judgment of the Supreme Court :— 1865. June, 6.

Conviction and sentence set aside and case remanded for further evidence, as the Court cannot ascertain the true state of the case from the evidence now before them. The mere act of stopping the complainant and preventing him from going in any one direction, but leaving him at liberty to go in any other direction he pleases, does not amount to false imprisonment, but if he was sent against his will to the Pangwille court, this would amount to false imprisonment ; and if he was compelled to stay at the tollbar, not being allowed to move in any direction, this would be imprisonment. We cannot do better than cite on this important question part of the valuable judgment of Mr. Justice Patterson, in the case of *Bird* v. *Jones*, 7 Queen's Bench Reports, p. 751.

" I have no doubt that in general if one man compels another to stay in any given place against his will, he imprisons that other, just as much as if he locked him up in a room : and I agree that it is not necessary in order to constitute an imprisonment, that a man's person be touched. I agree also, that the compelling a man to go in a given direction against his will, may amount to imprisonment. But I cannot bring my mind to the conclusion, that if one man merely obstructs the passage of another in a particular direction, whether by threat of personal violence or otherwise, leaving him at liberty to stay where he is, or to go in any other direction if he pleases, he can be said thereby to imprison him. He does him wrong, undoubtedly, if there was a right to pass in that direction, and would be liable to an action in the case for obstructing the passage, or an assault if, on the party persisting in going in that direction, he touched his person, or so threatened him as to amount to an assault. But imprisonment is, as I apprehend, a total restraint of the liberty of the person for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him."

C. R. Galle, No. 3000. } *Eaton* v. *Lloyd*.

The plaintiff relied on the following letter of the defendants to rebut the plea of prescription put forward. The letter in question was addressed to plaintiff's proctor, in these terms :— Prescription —acknowledgment.

" I called, but unfortunately found you away. Kindly forward per post Mr. Eaton's bills, and should I not possess a receipt for the sum, I will immediately remit you a cheque for the amount."

The commissioner considered this letter to fall short of an acknowledgment, and accordingly nonsuited the plaintiff.

1865. June, 8. — On appeal, the judgment was affirmed as follows:—

This is a claim for the amount of a shop bill which would be prescribed unless the defendant could prove a sufficient admission within the prescribed period.

The letter from the defendant put in for that purpose does not contain a promise of payment or any acknowledgment or admission of the debt. It merely states that should the defendant not possess a receipt for the sum, he will remit a cheque for the amount.

The acknowledgment, to take the case out of prescription, should be such as to convince the court that the debt has not been paid or satisfied.

June 8th.

Present :—Creasy, C. J., Temple, J., and Stewart, J.

J. P. Kandy, No. 6,173. } *Regina* v. *Ariacooty*.

Bail—criminal charge—discretion of court.

This was an appeal from an order of the justice of the peace, Kandy, refusing bail to the prisoner who was committed for trial for embezzlement.

Ferdinands for the accused, *Berwick, D. Q. A., contra.*

The following is the judgment of the Supreme Court :—

In this case the committing magistrate has refused to take bail, and an application has consequently been made to this court, under the 84th sec. of Ord. No. 1 of 1864, which enacts that—" in every " case in which any person considers himself aggrieved by the pro- " ceedings of any justice in having committed him to prison, or " refused to admit him to bail, or in having required excessive bail, it " shall be competent to such person to apply to the Supreme Court, " which shall make such order thereon as the circumstances of the " case shall seem to require. Such applications shall be subject to " the rules and regulations relating to appeals from police courts."

It is clear to us that the words which direct us to "make such order thereon as the circumstances of the case shall seem to require," empower and require us to use our discretion as to whether we shall make an order directing the justice of the peace to take bail, or take bail ourselves, and if so, in either case, to what amount, or whether we shall refuse to make an order to bail at all, and leave the prisoner in custody to await his trial.

The principles according to which judicial discretion, as to bailing or not bailing, should be exercised, are well stated in Burn's Justice, title Bail, section ii. It is truly pointed out that the test is

to consider the probability or improbability of the accused person's appearing to take his trial, or absconding ; and not merely to consider whether he seems to be innocent or guilty ; although this last mentioned consideration forms one of the elements of the true test. 1865. June 8. —

To adopt the words of the editor of Burn, "the enormity of the "offence,—the rank and station of the accused,—the presumption "of his guilt or innocence, the severity of the punishment for the crime charged, may all be taken into consideration in estimating this probability."

First, then, let us see what is the nature of the charge against the prisoner? The charge is, in substance, that he, being employed by one of the banks in an important and confidential position, unfaithfully and dishonestly appropriated and stole his employer's money to the amount of £4,000. Such a charge is a very heavy one.

Next, what is the social position of the accused? He is evidently a person of wealth, influence, and good connexion among those of his own race; so that the desire, for their sake as well as his own, to avoid the shame and exposure of a public trial and conviction, would be likely to operate strongly ; and the means also of escaping altogether from justice, if he was once set at large, would be ready and abundant.

Thirdly, as to the presumption of his guilt or innocence. On this we wish to say as little as possible, lest his case at his trial should be in any way prejudiced. We will therefore only remark on this point that, as the depositions stand, they shew a strong case against him.

Fourthly, as to the severity of the punishment. That of course, if he is convicted, will be regulated to a very great extent by the discretion of the judge, who in apportioning the punishment would weigh carefully all the favourable as well as the unfavourable circumstances that may be brought to his notice at the trial. It is enough for the present to remark that persons guilty of such crimes are liable to heavy punishment. On every one, therefore, of the general principles which are to determine the question of bail, we are led to a decision to refuse it here. And there is also the strong special circumstance, that this man has already absconded when this very charge was preferred against him. We feel that the probability of his absconding again, if once released from custody, is so great, that it is our duty to refuse to make an order for his being bailed.

1865. June 8.

C. R. Colombo, No. 29,279. } *Daniel Appu* v. *Sanchy Appu.*

Sale of growing trees—verbal agreement—Ordinance No. 7 of 1840.

The Commissiouer in giving judgment for plaintiff set out the following facts :—

" Plaintiff and defendant jointly purchased a piece of forest; and divided the land into two parts. They then made a verbal agreement that plaintiff should sell to defendant for £12 all the " jungle trees" (as the witnesses call them) on plaintiff's half, the other trees, as del, godepera &c., being received by plaintiff. In pursuance of this agreement, defendant paid plaintiff £4 10s. of the purchase money, removed all the jungle trees, and then refused to pay the balance.

" It is contended for defendant, that plaintiff should be nonsuited, as the agreement, not being notarial and written, is void under the Ordinance of Frauds : and the Supreme Court decision in case D. C. Colombo, No. 30,502—January 1841, (Morgan's Digest p. 304) is quoted in support."

On appeal, the Supreme Court affirmed the decree of the court below in these terms :—

No question arises in this case under the Ordinance of Frauds.

The plaintiff does not seek to establish any disputed interest in land or trees. He is admitted to be a joint owner holding a separate portion of the land.

He is clearly entitled to recover the value of his trees cut and removed by the defendant.

C. R. Jaffna, No. 32,178. } *Sivakamy* v. *Nagan.*

Thesavalamai—right of wife to sue her husband.

The following is the judgment of the Supreme Court :—

Set aside, and remanded to be heard. The right of a wife under the Jaffna law to sue her husband has frequently been recognized by the Supreme Court. See Marshall's Reports, pp. 160, 218 and 219.

This right was upheld by this court in D. C. Jaffna, No. 11,661, so late as 16th January, 1862, affirming the judgment of the district court on the point.

The commissioner records that the plaintiff sues for her dowry property. There is no such statement in his plaint. But plaintiff may amend.

June 22nd.

1865. June, 27.

Present :—CREASY, C. J., TEMPLE, J., and STEWART, J.

D. C. Jaffna, No. 13,126. } In re *Mohamadu Canny*, deceased.

This was a contest for letters of administration. On appeal by the second opponent against an order of the court below granting the letters to the applicant Ibrahim, the Supreme Court set aside the order in these terms :—

Administration—Mohamedans—Mohamedan code of 1806.

The Supreme Court is of opinion that the Mohamedan Code of 1806, set out in the first volume of the Ordinance, applies to the whole island, and that from it, it clearly appears that a maternal aunt is entitled to a share of the inheritance in a case like the present. The second opponent and appellant is therefore the nearest of kin to the intestate, and as such entitled to administration.

June 27th.

Present :—CREASY, C. J., TEMPLE, J., and STEWART, J.

D. C. Colombo, No. 32,263. } *Passe* v. *Alston* et al.

The following is the judgment of the Supreme Court:—

Common carriers—liability of—costs.

Set aside and judgment to be entered for plaintiff for £10 without costs.

Having regard to the substantial merits of this case, it appears to the Supreme Court that the defendants were common carriers and could be exempted from liability by proof only that the accident happened by the act of God, or the Queen's enemies. It has been found correctly that they have failed to prove either of these excuses.

The issue raised about negligence was irrelevant. The plaintiff ought to have judgment for the value of the bale, but as he contributed to bringing the case on before the district court on an irrelevant issue, the Supreme Court thinks that he ought to have no costs.

1865
July 5.

July 4th.

Present:—CREASY, C. J., TEMPLE, J., and STEWART, J.

C. R. Kegalle, No. 4,745. *Perera* v. *Panambe Unanse.*

Prescription —breach of contract.

The decree of the court below was affirmed as follows :—

This judgment apears to be right. The action is in effect an action on a contract to indemnify ; and in actions for breaches of such contracts, the time of prescription runs from the time of damnification. The date of damnification here was the time when the plaintiff was obliged to pay his vendee.

5th July.

Present:—CREASY, C. J., TEMPLE, J. and STEWART, J.,

C. R. Galle, No. 29,246, *Jansz* v. *Tranchell.*

C. R. Batticaloa, No. 10,551. *O'Dowd* v. *Silva.*

Salary of public officer —seizure by fiscal—civil debt— —authority of 'taken for granted' law —power of Court of Requests to attach a fiscal of a province beyond its own special jurisdiction.

The following is the judgment of the Supreme Court :—

The main question in both these cases is, "is the salary of a "public officer of this island liable to be taken in execution by the fiscal for a civil debt?

It is a question of great practical importance and we have deferred our judgment for a considerable time, out of a wish to obtain all possible information on the subject. It has also been necessary to consider whether, even if such salary may in some cases be liable to seizure, there may not be other cases in which such salaries are exempt.

Generally speaking, a fiscal who holds a writ against the property of a judgment debtor, has a right to seize any property of that person within his (the fiscal's) jurisdiction until the judgment is satisfied. It is also certain that by the Roman Dutch Law debts due to a man are considered part of his property and are seizable as such. The forms of our writs of execution accordingly specify debts as subjects of seizure. It is further certain, (and it was admitted by the learned Queen's Advocate in his able argument against salaries being seizable) that the salary of a public officer, when his service has been properly performed, and when the time for payment has arrived, is due to him as a debt; and that if it

were not paid, he might maintain an action for it against the Queen's Advocate as representing government.

The result of these propositions would appear to be that the fiscal can take, and ought to take, the salaries in execution.

But it has been learnedly argued that by the Roman Dutch Law salaries of this description are specially exempted from liability to seizure in execution.

The onus of proving such exemption lies on those who affirm it. We do not think that this has been done to the full extent of the claim made for such salaries being absolutely privileged from seizure in arrest of any kind and to any amount: but we do think that there is fair proof of their being only liable under certain conditions, and subject to the discretion of the court whence the judgment issued.

English authorities have been cited in favor of absolute exemptions: but they have not much weight here, on account of the difference between the English laws and the Roman Dutch law as to "choses in action," and also by reason of the difference between the two laws as to the right of a subject to sue the sovereign power of the state for a debt. Reference has been made to Scotch law, but the book to which we have been referred, namely Bell's Commentaries pp. 127-128, only shows that the Scotch law as to the exemption or non-exemption of the salaries of public officers was in a very unsettled and conflicting state, and no argument by way of analogy can be safely drawn from it to bear upon the present case.

The great strength of the case in favor of these salaries being exempt, lies in the undoubted fact that they have always been treated as such by our courts and judicial officers. We have taken great pains to ascertain this from those whose station and experience give their statements the greatest weight. The very absence of all decisions on the subject in our books of reports confirms this, for it shows strongly that until recent proceedings, no attempt even to treat these salaries as liable to seizure has been made. It certainly may be said that long usage and ancient opinion in such matters are not conclusive; and the supposed law on the subject may be part of what Lord Denman in *O'Connell's case* termed, "taken for granted" law, which may impose for a long time but which is found to be unsound and unreal, as soon as it is tested. Still the argument from experience is strong in such matters, if supported by the dicta of writers of authority. Where so supported, we think that it ought to prevail: though we are not prepared to uphold it when totally destitute of such support, and when, as we have seen, there are arguments the other way.

We now come to the consideration of the text books which have been quoted on the subject in the court below, and here; and

1865. July, 5. also of those which our subsequent investigations have led us to consider.

We do not rely on the passage from Vanderkeessel commented on in the judgment of the Batticaloa court, nor do we think the passage in Van Leeuwen's *Censura Forensis* decisive, which was pressed on our attention when the first of these cases was argued. Van Leeuwen (pt. 2, bk, c. xv. p. 61) says indeed that certain things are "ab arrestis immunia" among which are reckoned "stipendia militum" and "hisce annumerantur advocatorum professorum et ecclasiœ ministrorum stipendia." It is to be noticed that Van Leeuwen does not extend this privilege to the salaries of public officers generally: moreover in this passage (which was the one quoted to us) he is speaking not of execution after judgment but of the liability of property to seizure for the purpose of founding jurisdiction. It is the xxxiii chapter of the same book that treats "de executione rei judicatæ," and he there makes the "stipendia" liable to be taken in such execution if other property fails. The fact that he makes this liability conditional only, is not to be lost sight of, but he certainly disproves the claim to absolute exemption.

The authorities which seem to us to throw most light on the subject are Matthæus *de Auctionibus*, lib. i. c. vi. sect. 20 and *Voet.* lib. 2. tit. 4. sect. 52, and the same commentator's book xlii, title 1, sections 42 and 43. Matthæus shows clearly that the salaries of public officers generally are to be treated in this respect, in the same way as "stipendia militum" and the general effect of what he says is this: as to liability to execut ion, the salaries of public officers are in the same category as beasts of the plough, a man's tools of trade, his clothing and his bed, and a scholar's or a professor's books,—things which by the law of Holland (as by the laws of many other countries) could not be taken in execution, so long as there was any other kind of property out of which the judgment could be satisfied. He seems also to consider that even then the judge would have a discretion in granting seizure or not, for he quotes with apparent approbation the decision of a judge, who would not allow the salary of an officer of the public water works to be seized, on account of the public inconvenience which would be cansed, if the state were to lose the officer's services, a loss which he regards as the natural consequence of the stoppage of the officer's pay. Voet speaks of this subject twice,—once in book xvii, title *de re judicata,* where he deals with it briefly, using however these important words "stipendia non "posse capi quamdiu victor rem judicatam aliis potest rationibus "exsequi," but he refers to what he had said on the subject of such property being seizable in his comment on book 2, tit. iv, sec. 52,—a

passage he evidently means to be applicable to both kinds of arrest. He there says that the more correct opinion is that "*professoribus* "*verbi divini ministris, advocatis medicis aliisque* debeta arresto gravar "posse." But he adds this very important paragraph: "Sed an in totum an vero pro parte tantum et pro quâ "portione de eo variantes regionis cujusque mores inquirendi et pro "more loci cujusque subinde et providi ac circumspecti judicis "arbitris id definiendum", and he mentions, as an instance to show how the law on this subject varied according to local usage, that in certain districts of the United Provinces only half the salaries of the "concionatores" could be taken in execution.

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This passage of Voet, coupled with the others which we have referred to, seems to contain the sound law and the sound sense of the matter. The salaries of public officers are not liable to be taken in execution so long as there is any other property of the debtor, whence satisfaction may be obtained and even then, wheu it is proved that there is no other property available, it is for a prudent and circumspect judge, having regard to the usages of the locality, to decree whether all the salary is to be taken, or a part only, and, if so, what part. We think that these high authorities fully warrant us in upholding the long usage of our courts so far as to adjudicate that the salary of a public officer is privileged from being seized in execution, until it has been proved to the judge that there is no other property available, and until the judge has made a special order for the seizure of the salary.

We think also that the judge in making such an order, has an ample discretionary power to consider whether the salary shall be taken at all, and if so, how much of it, and in considering that question, he should have regard to all the circumstances of the case: to the amount of the salary, the necessities of the officer, and to the interest of the public in not being deprived of the officer's services.

We think further that the judge should, as Voet recommends, have regard to the "morem loci," and as it has not been usual here for salaries to be seized, he should require the creditor to make out a strong case before he grants an unusual order. Subject to these conditions and to the exercise of this judicial discretion, we think salaries liable to be taken in execution but not otherwise.

As these conditions were not fulfilled in either of the cases before us, we shall set aside the order made in the Batticaloa case commanding the fiscal to seize the salary of the defendant; and we shall affirm the decision in the Galle case refusing to extend and reissue the writ in order that the defendant's salary might be seized under it.

Another point of some practical importance arose in the Batticaloa case which it is better to deal with here. It was argued that

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a commissioner of a Court of Requests cannot attach the Fiscal of another province. We think that the rules 5 and 39 of the Court of Requests, Ordinance No. 9 of 1859, show that this may be done when the Fiscal is really in default. But as we hold that the Fiscal here did right in not seizing the salary, it follows that no attachment ought to have issued.

8th July.

Present :—Creasy, C. J., Temple, J., and Thomson, J.

D. C. Colombo, No. 2,784. } In re *De Raymond*, deceased.

Last will—intention of testatrix—undue influence—memorandum of instructions—interest of executor—his active part in directing preparation of will—his son a legatee—insanity of testatrix—evidence of medical attendants—necessity of scrutiny into such evidence—caution against setting aside a will executed regularly and of free will—illusions and delusions.

The following is the judgment of the Supreme Court:—

This is a case respecting the validity of a will made by Lucella Henrietta De Raymond, a widow lady possessed of considerable property, who died at Colombo on the 20th day of April 1863. The date of the will is the 24th October 1845.

The executor, Mr. Gerrit William Stork, applied for probate, Mr. Jacob Piachaud, the brother of the deceased, opposed this application, and impeached the will as not genuine, and as having been made by the testatrix when in an unsound state of mind.

The case has been twice heard before the District Court; and on both occasions judgment has been given there in favor of the validity of the will.

When the appeal from the first judgment came before us, affidavits were produced by the appellant (opponent of the will), as to further important evidence being obtainable; and we there upon directed a further hearing, and gave leave to amend the pleadings by raising the objection that the will was obtained by undue influence.

The additional evidence has been heard, the District Court Judge has again given judgment in favor of the validity of the will; and on the appeal against that judgment, the case has been fully and learnedly argued on both sides before us.

We will first take an outline of those facts of the case, which, are undisputed, or which are, at least, so clearly proved, as to be beyond all reasonable question.

Mrs. De Raymond and her husband were persons of property and of good position among the Burgher community in this place. Mrs. De Raymond appears to have been at all times considered by many people a very ecentric womau, but she seems to have mixed in society in the ordinary way during and for some time after her husband's life time. She appears to have had milk fever after one at least of her confinement. The husband died in 1823. Mrs.

De Raymond proved his will jointly with Mr. Piachaud, her brother, the present opponent of Mrs. De Raymond's will. Only one of her children lived to maturity, and the events connected with the death of that son (which occurred in May 1845) are of very great importance in the present case. The young man and his mother lived on wretched terms with each other, and their disputes frequently arose out of her objections to his plans for managing his property. From what we know of the general nature of her objections, we should infer that she was a person of shrewd and suspicious mind, but not of a mind under any delusions, and certainly not of mind so weak as to be easily influenced by others. There is also strong proof (see especially the evidence of her Proctor and legal adviser, Mr. Prins), that she was perfectly competent to attend to business-matters, and that she did attend to them sharply and systematically down at least to the critical year 1845. At the same time, there is evidence, which we see no cause to doubt, of her still having been eccentric in many of her habits and of her having been slovenly and dirty, not merely to an extent which could not be expected in a person in her station, but to an extent which could not be expected in any person who had a due sense of the decencies of life.

In the early part of 1845, the quarrels between mother and son grew more and more vehement: and on one occasion the son used personal violence towards his mother, causing an injury to her arm, which sho believed or fancied to be a fracture, but which was really a sprain. The son appears to have implored her forgiveness, which she inexorably refused, and she rejected all attempts made by friends to bring about a reconciliation between them. While the mother and her only child were on these deplorable terms with each other, but still residing under the same roof, the unhappy young man on the 22nd May 1845, committed suicide. The descriptions of the mother's state after this are appalling: whether they indicate insanity, or the effects of the agonies of grief and remorse, will be considered hereafter. On the 24th day of October 1844, that is, about 5 months after the son's death, she made the will in question. It was drawn by Mr. Drieberg, a notary, who received his directions to prepare it from Mr. Stork, the present respondent, who was also a notary, and who had occasionally acted in business matters for members of the family. Mrs. De Raymond's son had been god-father to Mr. Stork's son, and it is clear that Mr. Stork had been regarded as a friend by the family, especially by the son. We are at present dealing with those parts of the case only which we consider to be beyond fair dispute, and we will presently examine the contested allegations, as to how Mrs. De Raymond came to ask Mr. Stork's assistance about the will,

1865. July, 8. — or whether Mr. Stork improperly induced her to have such a will prepared.

Besides some testimony which has been treated by the opponent as questionable, there is the testimony of one witness whom all parties concurred in describing as a person of the highest honor and of perfect integrity. This witness, Mr. Drieberg, gave evidence at the first hearing of the case, since which time he has died. He was a proctor and notary of very extensive practice, and ot many years standing, justly respected by all who knew him, and deservedly regarded as the first man in his branch of the profession. The character borne by him is important in this case for further purposes than merely as a security for the truth of his evidence.

Mr. Drieberg proved that Mr. Stork in October 1845 (some 3 or 4 days before the execution of the will) brought him a draft of a will already written out and a memorandum of legacies, which memorandum is in Mrs. De Raymond's own writing, and is a most important document in this case.

It sets out seventeen specific sums in rix-dollars, with the names of the intended recipient opposite to each sum; and at the foot are these words "all the rest of my money is to the Dutch Church." The aggregate amount of the specific bequests is upwards of £10,000. Mr. Drieberg made some techincal corrections in the draft brought to him by Mr. Stork and drew the will now in dispute, taking the draft and the memorandum as its basis. On the 24th of October, Mr. Drieberg and the intended attesting witnesses, Mr. Archibald Andree and Mr. James De Alwis, went together to Mrs. De Raymond's. They were shown into her bed-room. Mr. Drieberg had known her for years; but he had never had a personal interview with her before. The will was read to her, and was regularly executed and attested, as was also a duplicate and Mr. Drieberg proves clearly the most important fact, that when she was asked, before executing the will, if it was all right, she herself desired to see her own memorandum of legacies, and compared it with the will before she signed. Mr. Drieberg says "she appeared to be perfectly aware of what she was doing." He thought her manner towards himself cold and discourteous. He at that time had never heard any reports that she was insane, though he did hear such reports soon afterwards. He says that if he had heard such reports previously, he would have taken instructions only from her own lips. Mr. Drieberg further proved that he sent the executed will to Mr. Stork, and that he did so at Mrs. Raymond's request.

The will first states what the estate consisted of, and how each part had been acquired by Mrs. De Raymond. It shows that, independently of what had devolved on her a few months before, in consequence of her son's death, she had £3,180 to dispose of: she

had become possessed in right of her late son of property of a much larger amount. 1865. July, 8.

The legacies which are most material to notice are a bequest of 25,000 rix-dollars=£1,875, to her brother Mr. Jacob Piachaud (the present opponent of the will) and of the like sum to her sister Mrs. Janet Rueger.

Had she died intestate, these two, her brother and sister, would have taken all her estate. Under the will they get together 50,000 rix dollars=£3,750. This however exceeds by some hundreds of pounds, Mrs. De Raymond's own original property independently of the property that devolved on her by her son's death.

There are various small legacies to god-children, servants and friends; the other material legacies are a legacy of 15,000 rix-dollars £1125 to Lawrence Adolphus Stork, son of Mr. Gerrit William Stork, and of 22,003 rix dollars or £1650 to Mr. Charles Beling.

Mr. Gerrit William Stork was appointed sole executor. The aggregate amount of the legacies exceeds £10,000, and there seems no reason to doubt the estate being of at least that value.

There is very little evidence that can be called undisputable, as to Mrs. De Raymond's condition during the long interval that passed between the making of the will in 1845, and her death in 1862. It is clear that she lived in almost entire seclusion from society. Her brother Mr. Piachaud received the incomings of her property for her as had been the case, according to him, ever since 1818. He paid her monthly £22 10, with which she maintained her household. Sometimes she had larger sums, in one case on the 31st December, 1850, he paid over to her a sum of £300. No supervision or check over the disposal of this or other sums of money appears to have been exercised or attempted. In the management of her household, she seems to have given out every morning a specific sum, always of the same amount, to a servant called Jogo, which sum was to cover the bazaar expenses of the day.

This servant was a witness for the respondent, at the first hearing, and deposed strongly to Mrs. De Raymond's anxiety but she cannot be regarded as an entirely satisfactory witness. For two years before Mrs. De Raymond's death, she Mrs. De Raymond, suffered from diarrhœa and other maladies, and she died of abscess in the lungs. A clergyman and a catechist, who visited her during the month before her death, to administer spiritual consolation, found her, in their opinion, perfectly sane.

Such is an outline of what may be termed the sure parts of fhe case. The debateable ground is far more extensive and intricate. Having regard to the issues raised, and having seen that the cormal execution of the will was duly proved, we have to see,—

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First.—Whether there is satisfactory proof that the will contained the mind and intention of the deceased at the time it was executed.

Secondly.—Whether that mind was sane or insane, capable or incapable of giving effect to such a will.

In stating these as the topics of enquiry, we follow the course taken by Sir John Nicholl in his judgment in the case of *Wheeler* v. *Anderson*, 3 Haggard's Reports, 574, a case which in many respects throws light for our guidance in the present case.

The opponents of this will have given no express affirmative evidence to show that it was obtained unfairly, by pressure exercised on a weak mind, or by abuse of professional influence.

They could hardly, from the nature of things, be expected to adduce such express evidence. They rely, as to this part of the case, on Mr. Stork's notarial character, on his never having been employed by the testatrix in that character before, on the active part taken by him in directing the preparation of this will, and on the fact that under the will his son would receive a large legacy, and himself have a very lucrative appointment as executor. We think that this is at least enough to require the court to look for more than the ordinary proof of bare execution, before we are satisfied that this will expresses the free and independent intention of the deceased. Mr. Stork's account of the transaction is briefly as follows :— He says, that he had known the deceased and her son long and well ; that in 1845, he was sent for by her, and that she said that she wanted to consult him about making a will ; that she handed him the memorandum of legacies already referred to, of the dispositions, which she desired to be made of her property ; that she told him that she wished him to be her executor, on which he informed her that he could not be executor and notary also ; and that he recommended Mr. Drieberg, as notary, which she agreed to. That he promised that he, Mr. Stork, would prepare the will for her, and that he had further communications with her as to its contents. His evidence agrees with that of Mr. Drieberg's as to the draft and memorandum being sent by him (Mr. Stork) to Mr. Drieberg to be the basis of the will, and as to the will being sent by Mr. Drieberg to him, Mr. Stork, after execution.

We cannot help remarking how much better it would have been, on Mr. Stork's own showing, if, when it was arranged that Mr. Drieberg should be the notary, Mr. Stork had sent that gentleman to take instructions personally from Mrs. De Raymond ; and had left the real as well as the nominal preparation of the will altogether to him. But the question for our decision is not whether Mr. Stork took the best possible course for a sensitively honorable and cautious man in the matter, but whether he took such a course as invalidates the will.

With regard to how far Mr. Stork had acted professionally before this time for Mrs. De Raymond, his statement at the first hearing of the case was: "I have done work from 1838 to 1851 for her, her son, and Mr. Piachaud," and on cross-examination he said "by work from 1838 to 1851, I mean work as notary." At the time of this hearing no issue had been raised as to undue influence. At the second hearing, after this issue had been added, Mr. Stork was again examined. He then said on the subject, "the will is the only transaction about which Mrs. De Raymond employed me at all. I did business for opponent, (that is Mr. Piachaud) till 1851." 1865. July, 8. —

It is however quite clear from the evidence of Mr. Henry Prins, given at the hearing, that he, Mr. Henry Prins, down at least as late as the time of the son's death in 1845, was Mrs. De Raymond's regular legal adviser.

But we do not feel it necessary to give an opinion as to the sufficiency of Mr. Stork's own evidence, because it seems to us that the existence of the memorandum of legacies in the deceased's own writing, and the unquestioned testimony of Mr. Drieberg respecting the use made of it by the deceased, do supply the full proof, which ought to be required in such a case, that the will expressed the free mind of the testatrix. Similar memoranda were held to establish the will in this respect in *Wheeler* v. *Alderson*, although that was a much stronger case against the executor than the present, for there the executor himself wrote the will; he was the deceased's solicitor; the will contained large legacies in favor of him and his family; and it was executed by the testatrix at his office, when there was no one present, except himself, the testatrix, and two neighbours, who were called in as attesting witnesses, and who could not remember whether the will was read over to the testatrix or not before she signed it.

It has been ingeniously argued that the preparation of the memorandum in the present case, and the intervention of Mr. Drieberg, were parts of Mr. Stork's cunning scheme to make the will seem a valid one. But is this reasonably probable? If the memorandum had been written by Mrs. De Raymond and obtained from her by coercion, unfair importunity, or artifice, why should she at the time of the execution of the will have required to see the memorandum, and compared the will with it before she signed? It is to be remembered also, that Mr. Stork was not present at the time when the will was executed. Mrs. De Raymond was certainly then under the immediate pressure of no undue influence, and we cannot but feel convinced that before she signed, she carefully satisfied herself that the will was in accordance with the memorandum of legacies, which she herself had written, and which she

1865. July, 8. — had intended and still intended to regulate the distribution of her property.

Considering it to be proved that the will expressed her mind and was her own free act, the question still remains, "was that mind at the time sane or insane?" And here the burden of proof certainly lies on those who assert that insanity existed.

The opponents of the will have alleged that Mrs. De Raymond was in a state of at least incipient insanity from 1820 until the time of the son's suicide in May, 1845; that in the interval between the son's suicide in the month of May, and the execution of the will in the month of October in that year, she had become decidedly, completely, insane; and that she continued to be so at the time when the will was made; and, in fact, as they assert, down to the very time of her death.

This they undertake to prove by medical and other testimony.

The two regular medical attendants of Mrs. De Raymond are dead; but other medical gentlemen, who attended her occasionally, or had other opportunities of observing her, have been called, and and it is but justice to the opponents of the will to say, that they have brought forward all the medical evidence that could possibly be procured on the subject.

If the positive averments of medical practitioners that a person was mad, uncontradicted by the evidence of other medical practitioners, are to be taken as conclusive proof of insanity, insanity has certainly been proved here. But, while all due respect is to be paid to the skill and to the trained judgment of professional gentlemen on such a matter, it is still the duty of our courts not only to hear their opinion, but to enquire into the causes of their opinions, and to learn the facts, or supposed facts, on which such opinions are founded. Accuracy or erroneousness of such witnesses' memories as to facts is as much open to scrutiny and comment as in the cases of any other witnesses. It is especially necessary to scrutinize closely in the present case, where the witnesses speak to things which happened many years ago, and where none of those witnesses can fortify their recollections, or supposed recollections, by notes or minutes made at the time. The learned judge, who twice tried this case in the district court, has commented in his judgments on the medical testimony with singular care and sagacity. His remarks deserve great attention and they have received it from us, though our own judgment has by no means been formed on them exclusively, or even principally. We have carefully analyzed the case for ourselves, and have considered long and anxiously the principles on which it should be determined, and the mode in which those principles ought to be applied.

It appears to us that, when it has been clearly proved that a testamentary or other instrument has been regularly executed by any person, and that such execution has been an act of that person's own free will, it would be unsafe and erroneous to adjudicate such an instrument to be void on account of the unsoundness of mind of the person executing the same, unless one of three states of facts with regard to that person's mind is clearly proved to have existed.

First.—It may be proved that illusions or delusions existed in the mind. We mean by *illusions* the fancying the existence, past or present, of things, persons or acts, that never had or have any real existence at all. We mean by *delusions* the fancying something, person or act, which really existed or exists, to have been or to be in its character or circumstances widely different from the reality.

Secondly.—It might be proved that the powers of memory and recollection had totally, or almost totally perished.

Thirdly.—Cases may occur, in which, although the mind harbours no unreal fancies, or fanciful distortions of realities, and although considerable powers of memory, and much readiness of recollection may exist, still the mind has lost the faculties of rationally connecting one fact or one idea with another, of perceiving sequences, so that images of the past and present float and flit before it, like the vague objects of a phantasmagoria.

We should consider the mind which is proved to be in any of these conditions, to be in a state of unsoundness. But we look in vain through the long mass of evidence in this case for satisfactory proof of the kind. The only illusion or delusion, which is imputed to Mrs. De Raymond, is that when her arm was injured by her son, she thought she had received a mortal injury, and she thought it still bad after it was healed. This is called by Dr. Kriekenberg her "hallucination." But it was hazardous to classify such mistakes among the delusions of madness. Mistakes as to whether an injury is a fracture or a sprain, sometimes happen to medical men. An exaggerated dread on the part of the sufferer of the consequences of a supposed fracture may exist without madness, and as to the length of time for which the mischief lasts, the patient, who feels the pain, knows better than the doctor when the sprain is healed, if by the "healing of a sprain" (Dr. Kriekenbeek's own phrase) is meant the complete restoration of the injured part to a healthy state, so that it can be used without inconvenience, and so that it is not abnormally weak and inefficient.

With regard to the tests of insanity to be drawn from the presence or absence of adequate power of rationally combining facts and ideas, the unquestioned evidence in this case of Mrs. De Raymond preparing the memorandum of legacies, of her remembering

1865. July, 8. it when the draft will was brought to her, and of her comparing the draft will with it before she would sign as testatrix, are conclusive. They are not to be overborne by the vague statements of a witness, speaking after a lapse of many years, that he thought her memory impaired.

We have seen what the evidence on the part of the opponents of this will fails (in our opinion) to prove. We will test their case in another way and see what the evidence adduced by them does prove.

The first witness called by the opponents of the will to prove Mrs. De Raymond's insanity was, Mr. John Theobald Prins, who describes himself as a medical practitioner, and who says that he attended in the family "off and on" from 1817 to 1824. He says that during all that time Mrs. De Raymond was not sane. But as it appears, from the beginning of his cross-examination, that he was eleven years old in 1814, he could only have been fourteen years old in 1817, the period at and after which he asserts Mrs. De Raymond to have been mad. He also says that she was insane in 1837, giving however very inadequate reasons for saying so. But it is hardly worth while to discuss minutely the evidence as to the period anterior to 1845, as the opponent scarcely asserted more than that her insanity was incipient during that period ; and there is on the other side abundant evidence of her having during all that time attended to business matters regularly and shrewdly. There is especially the testimony given by her proctor, Mr. Henry Prins, on the second hearing, a witness upon whom no imputation has been cast. This gentleman says that he was Mrs. De Raymond's legal adviser in all things from 1838 to 1845, in numerous law suits (and he produces the records of as many as fifteen), and in raising money for purchases and other matters. He says also that he was on intimate terms with her as a family friend, and he says decidedly "she was perfectly sane." An attempt has been made on the part of the opponent of the will to parry the effect of this and similar evidence by referring to well known cases, where persons, who had acted with great cleverness and regularity in business matters, were yet rightly held to have been lunatics, because it was proved that their minds were under great and irrational delusions.

The answer is obvious. In the present case you do not prove, nay you do not even attempt to prove, any illusion or delusion of any kind, except the alleged mistake about the state of her arms The evidence therefore as to her capacity for business matters must have its usual and its full weight.

The two most material medical witnesses, Dr. Thwaites and Dr. Kriekenbeek, speak of the important year 1845. Neither of them has any note or memoranda on the subject : and they were

giving evidence as to things which had occurred nineteen years ago. 1865. July, 8,

Dr. Thwaites says that her state was one of "unsoundness of mind." He says that she had not "mania", that is "raving madness". Dr. Kriekenbeek and he contradict each other on this point, for Dr. Krekenbeek says that on the day of the son's death she had, mania or raving madness, and that he saw her once or twice so, during the time that Dr. Thwaites was in attendance. There can be little doubt that Dr. Thwaites is right on the point, for it is perfectly clear that Mrs. De Raymond was never put under restraint.

We must add that we think that there is very great force in the comment made by the learned District Judge in his second judgment as to the thoughtlessness and haste (to say the least), with which Dr. Kriekenbeek in his affidavit, which was laid before the Supreme Court for the purpose of obtaining a new trial, swore positively that Mrs. De Raymond was on the day of the son's death "in such a state of insanity as to require personal restraint, "and she was kept in a room by herself." This emphatic assertion on a point of the utmost importance in the case, when Dr. Kriekenbeek is in the witness-book, dwindles down to a statement that "she was kept in a room. I suggested she should be kept separate," and when questioned further on this point by the District Court Judge, he says "Mrs. Raymond went into the room when desired, she was never very violent. She was obedient when spoken to."

The extent to which Dr. Thwaites and Dr. Kriekenbeek may be safely trusted, seems to us thus far and no further. They prove that she was eccentric, dirty, and slovenly ; that she was shy, proud and reserved ; that she suffered greatly in mind in consequence of the disputes between her and her son, and that her mental sufferings were aggravated to a terrible degree when the son committed suicide. Her demeanour on and after that catastrophe appears to have formed the main reason why many of the witnesses thought her mad. Dr. Kriekenbeek says "she appeared not fully "to recognize the fact. She knew something had occurred." Her friend and neighbour, Mrs. Pheiffer, says "Mrs. De Raymond was "mute that day. She saw the body, turned back, and went away, "and showed no signs of grief." But there is an old saying, which is no less true than old, as to the silent stupor of intense grief under the first out-break of great calamity, as compared with the loquacious lamentations of slighter sorrow. "Curae leves loquuntur, ingentes stupent."

What too is her subsequent conduct as described by the witnesses, and what does it really indicate? Mrs. Pfeiffer, and a

1865. July, 8. — neighbour, Dr. Morgan, who watched her all this period, describe her as wandering about the garden at night time, scantily clad, looking wildly from side to side, muttering to herself and uttering cries of agony. She did not know that she was watched. Recollect this poor creature's situation at this period. Her son, her last surviving child, had just destroyed himself, driven to despair by her refusal of forgiveness, though he had sought forgiveness of her on his bended knees. She was a woman of religious belief, and we know what many religious people think as to the almost inevitable doom of the suicide. What tongue could describe, what other mind could even adequately imagine the agonies of a mother, who thought that she had destroyed her own child, body and soul? Consider too the hour at which the out-breaks of agony are proved to have occurred. She was a proud woman. Her friend, Mrs. Pfieffer, expressly says so. How truly does her conduct illustrate what has been written of—

> " All that the proud may feel of pain
> The agony they may not show,
> The suffocating sense of woe
> That speaks but in its loneliness."

During the day-time, when the eyes of the other inmates of the house were on her, she suppressed all signs of sorrow. But in the stillness, and, as she believed, in the loneliness of night, the poor wretch rose from her sleepless pillows and wandered forth, giving vent, in shrieks and inarticulate cries, to the ineffable misery that burned within her. Is this madness? surely not, unless the name of madness is to be given to all great grief, such as in its paroxysms beats down for a while even the strongest spirit.

There is only need to advert very briefly to the evidence of Dr. Bernard VanTwest, who attended the testatrix during the last two years of her life. He says that she was perfectly unsound in her mind; but the only reasons which he gives for saying so, are that she was dirty and that she answered his questions unwillingly and shortly. It is quite clear from the afterpart of his evidence that he has formed his opinion principally on hearsay from others, and it is not unworthy of remark that of the complication of maladies which she suffered under, no one was a complaint that would primarily affect the head. The clear evidence of the clergyman and catechist as to her sanity is to be remembered,—evidence which has been already referred to in the beginning of this judgment.

It was attempted to draw an argument against her sanity from the contents of the will itself. It was urged that no quarrel or ill-feeling was proved to have existed between her and her nearest relatives, and it was not likely that, if in her senses, she should

have willed away the bulk of her property to strangers. But it is to be remembered that she left to each of her next of kin, her brother and sister, the large legacy of £1,875. This is clearly no "inofficiosum testamentum," and it was ably pointed out that she had in fact left to her near reltives, all and more than all her own original property, as distinguished from that which devolved on her, when her son destroyed himself. 1865. July, 8.

It seems quite natural that under the strong reaction of feeling towards, him, which evidently possessed her after his death, she should have desired to dispose of the property of her lost child according to what she might suppose would have been his wishes on the subject.

He died childless, brotherless, sisterless ; Mr. Beling had been his dear friend, and had often striven to reconcile his mother to him. Young Mr. Stork had been his friend, and was his godchild. That under such circumstances Mrs. De Raymond should have directed large legacies to them seems to give no indication of a mind affected by insanity.

The extent to which she was treated as sane by Mr. Piachaud, the opponent of the will, himself, is fully commented on by the district court judge, and has been hereinbefore alluded to. We would not decide a case like the present on a mere *argumentum ad hominem*, but Mr. Piachaud's offer to procure a release from her in the testamentary case, and his advance of so large a sum as £300, to her, without any watch or restriction as to what she was going to do with it, must be taken into account, together with the numerous other facts of the case, which tend to show her recognized capacity for business matters. But after all, it is the scene of the execution of the will itself, as narrated by Mr. Drieberg, and which we will not again recapitulate, which seems to us most strongly to establish that her mind at that time was not only free from undue influence, but also that it was perfectly sane. She was certainly a person of eccentric and dirty habits ; but these do not constitute insanity ; otherwise, we should have to class among madmen many of the cleverest and most sagacious people that ever lived.

The effects of grief and remorse on her are found to have been terrible ; but it is not shewn that her reason was destroyed by them.

We cannot set aside the will of such a person, when it has been proved to us that that will was executed by her with full knowledge of its contents, and that it was her deliberate wish that her estate should be disposed of in this manner. Still we think that there was enough in the circumstances of this case, especially in Mr. Stork's conduct as to helping in the preparation of a will, under which he and his son were to benefit so largely, to awake

1865. December, 1. — suspicion, and to make the opposition of near relatives natural. Our judgment will therefore be in affirmation of the judgment of the district court except as regards costs. We set aside that part of the judgment and order, in that respect, that the opponent be allowed his costs of opposition out of the estate. In other respects, the judgment stands affirmed.

October, 24th.

Present:—CREASY, C. J., and STEWART, J.

C. R. Batticaloa, No. 13,000. } *Adam Baba* v. *Alias Lebbe.*

Practice—examination of party.

On appeal by plaintiff, the order of the court below was set aside and case remanded for hearing as follows:—

The plaintiff was entitled to call his evidence, and ought not to have been at once nonsuited on the effect of an isolated part of his examination as a party; which possibly he may have afterwards explained by evidence.

See *Lorenz's* reports. p. 157, per S. C. in D. C. Colombo, No. 18,802.

December, 1st.

Present:—CREASY, C. J., TEMPLE, J., and STEWART, J.

D. C. Galle, No. 22,408. } *Wijeyenaike Appuhamy* v. *Liesching.*

Justice of the peace—liability for wrongful act—Ord. No. 8 of 1814, cl. 6—search for lottery—power to seize and detain—trespass *ab initio.*

On appeal by defendant, the Supreme Court delivered the following judgment:—

The principal argument on the side of the respondents in this case was that the defendant had no right to seize the things used in the lottery, in as much as he was not a constable, or peace officer. The Lottery Ordinance No. 8 of 1844 gave him as justice of the peace no power to make the seizure himself, though he might on proper information have given others his warrant to do so. But this objection is met by the old Ordinance No. 6 of 1843, by which justices of the peace were first appointed in Ceylon. This Ordinance (and the new Ordinance of 1864, in this respect is the same), by section two, gives every justice power, *inter alia,* to search all places where "any goods, articles or things, with or in respect of

"which any offence has been committed, are alleged to be kept or "concealed." The power to search plainly involves the power to seize upon search without which it would be nugatory, and we have no doubt whatever that the money and box seized by the justice here were "articles and things with or in respect of which an "offence under the Lottery Ordinance had been committed." 1865. Decr., 1.

It follows therefore that the action cannot be maintained against the defendant as far as regards the seizure of the things in question. No point indeed about the seizure seems to have been raised in the court below. The district judge has given judgment against the defendant, not because he had no right to seize, but because the Ordinance gives no power of confiscation. But the question is whether the justice has not some power of detention, and whether, if so, his lawful power of detention has been exceeded by him. That there must be some power is self evident, it would be ridiculous to hold that a justice may search and seize, but that he must instantly give up what he has seized. One obvious extent of his power of detention is that he may, and ought to, keep the things so long as there is a reasonably probability of their being wanted in evidence on the trial of any of the offenders. Now in this case all who had bought tickets were offenders, and liable to prosecution. There is nothing in these proceedings to shew that there was no fair likelihood of any of them being prosecuted, and consequently there is nothing to shew that the defendant was not justified in continuing to detain what he certainly had lawfully taken.

There is another obstacle to the plaintiff's recovering anything except the mere box in which the money handed over by the purchasers of the lottery tickets was deposited. The defendant, as we have seen, was not a trespasser *ab initio*, and as such disentitled to dispute the plaintiff's right to the property arising from mere possession. On the contrary, the defendant's taking was lawful and his primary possession was lawful. He had a right to continue it against all but the true owners of the money. The plaintiff was not the true owner of the money. The persons who had staked it were the owners, and had a right to reclaim it from the plaintiff, as their stakeholder, at any time before the money was paid over to the winners. (See Voet as quoted by Marshall, p. 212.)

Altogether we hold that this action was not maintainable. The judgment for the plaintiff is to be set aside, and judgment of non-suit to be entered with costs.

1865.
Decr., 1.

D. C. Kandy, No. 40,446, } *Ambrose* v. *Strachan & Co.*

The following is the judgment of the Supreme Court :—

Liability of estate owners for rice supplied on superintendent's orders —credit to whom given —custom of owner— knowledge on the part of creditor— right of superintendent to pledge credit of owner.

In this case the plaintiff sued the defendants, who were admitted to be the proprietors of the Yahaletenne coffee estate, for the sum of £187 15*s.* 6*d.*, being principally due for rice supplied to that estate between March 7th, 1862 and May 30th 1863, on the orders of Mr. Barnett, who was then the superintendent.

The case is an important one ; and has been carefully considered, but our judgment is not to be looked on as laying down any general rule as to the liability or non-liability of coffee estate-owners for rice supplied on superintendent's orders. We decide this case on its own circumstances.

Before sketching those circumstances, we may state that in the conflict of evidence, we give very little credit to the plaintiff as a witness.

The unfair manner in which he answered on his examination as a party, and on his cross-examination as a witness, the first questions put to him about his taking Barnett's promissory notes, and the extent to which he has been contradicted on this matter by the production of documents, the genuineness of which is unimpeached, show that his testimony in his own behalf is of little value.

In the numerous matters in which he is contradicted by Mr. Brown, the witness for the defence, (a witness whose integrity is unimpeached) we believe Mr. Brown to be in the right.

It is clear that the custom of the owners of this estate was to supply their superintendent with all necessary funds for its management, including the cost of obtaining rice for the coolies, and that they left him to purchase the rice where he pleased, out of the funds with which they furnished him.

It is also a fact in the case that the plaintiff, before he began to supply rice to estates, was in the service of Mr. Brown, who was the general supervisor of this and other estates for the defendants.

The plaintiff first began to supply rice to this estate on Barnett's orders, about the end of November, 1861. The supplies up to March, 1862, were paid in full by Barnett. There have been part payments in respect of the supplies between 7th March, 1862, and May, 1863, the period to which the action relates, no order for the supply of rice appears to have been ever given by any one except Barnett ; and there does not appear to have been any communication between plaintiff and any one except Barnett as to plaintiff's claim for rice supplied, until May, 1863, when plaintiff had a a conversation (to be more particularly spoken of hereafter) with

Mr. Brown, defendant's supervisor. Plaintiff never made any claim on defendants until January, 1864. 1865. Decr., 1.

On the trial of this case, in order to ascertain on whose credit the plaintiff supplied the goods, the entries in the plaintiff's books were among other documentary evidence, referred to. In those books, no person or firm but "The Yahaletenne Estate" is entered as debtor for the goods supplied. This is ambiguous. It may mean the superintendent of the estate or the owners, or it may have been designed to support a claim upon either according to circumstances.

This case, however, cannot be treated as one, in which the creditor has an election either to sue the agent or to sue a principal who was unknown to him at the time of the sale, inasmuch as the plaintiff's own evidence shews that before these supplies he knew that the defendants were the owners of the estate.

What person or persons the plaintiff meant to debit under the term "Yahaletenne estate" is, as we have observed, ambiguous. There is however some reason for thinking that it did not mean the owners, because we find that in a matter where these defendants were clearly meant, the entry in the books was in the name of defendant's firm. The plaintiff's evidence shows this when he states that the entry for some gunny bags, for which he received orders direct from the defendants, are in the name of Strachan and Co., the name of defendant's firm.

But the plaintiff's books were in his own custody, and he might make any entry in them, without much likelihood of other persons seeing it, and objecting to the form. It is much more important to see how he made out the accounts which he sent in from time to time, because these accounts, though handed to Barnett, would be likely to find their way into defendant's hands, as vouchers for Barnett in settlement between Barnett and his employees. From the accounts produced at the trial it appears that they were headed thus, "D. R. Barnett, Esq., Dr. to Mr. Ambrose" there is nothing about the owners, nothing about the estate : Barnett is made simply and solely the debtor, as would be the case for goods supplied on Barnett's simple and sole credit. Another document (exhibit N.) is still more significant. It is headed "memorandum for D. R. Barnett, Esq." It sets out the amount due, and at the foot is a note addressed to Barnett personally, in which the plaintiff tells Barnett "above I beg to hand your memoranda." The plaintiff geos on to tell him that he encloses a promissory note for the amount, for his, Barnett's, signature and plaintiff says that when this is returned signed by Barnett he, the plaintiff, will "get the old one by giviñg this." These last words and three promissory notes produced at the trial, and the admissions which plaintiff

1865. Decr., 1.

was compelled to make, establish beyond doubt, that the plaintiff used to take Barnett's promissory notes for the balances left unpaid, and that he used to get these notes discounted, withdrawing them when about to fall due by fresh promissory notes given by Barnett. It is perfectly clear also that this mode of plaintiff's dealing with Barnett was not made known to the defendants or to their supervisor, Mr. Brown.

There was however about the date when the account now sued for closes, a very remarkable conversation between the plaintiff and Mr. Brown about Barnett and Barnett's accounts. We have already said that we believe Mr. Brown's narrative of this conversation. He proves that plaintiff asked him whether Barnett got his estate money every month from defendants ; that he was told that such was the case ; and that by arrangement, Mr. Brown afterwards received the estate money, including Barnett's salary, and that for some months he, Mr. Brown, paid the plaintiff £6 a month, stopt out of Barnett's salary, and in diminution of this very debt. In July 1863, after all the items of this account were due, the plaintiff got a draft from Barnett upon defendants for £80, which defendants refused to honour, and on the 16th January 1864, plaintiff for the first time claimed the money in the present account from the defendants. The letter alleges as an excuse for the delay, Mr. J. Hudson's absence in England. This is perfectly futile, as it is absurd to suppose that the members of the firm in Ceylon were incompetent to deal with a claim of £187. And plaintiff's story that Mr. Brown had told him to wait till Mr. J. Hudson's arrival, is flatly contradicted by Mr. Brown, whose evidence and not the evidence of the plaintiff, is believed by us.

Under these circumstances we are satisfied that plaintiff made the supplies to the estate, on the sole credit of Barnett the superintendent, that he knew at the time the defendants to be the owners of the estates, but knew also that the defendants as owners sent their superintendent funds for the purchase of all supplies necessary for the estate, aud that the superintendent had no right whatever to pledge the owner's credit.

The gunny bag items in respect of which the defendant has put in orders from the defendants direct, do not appear in this account. The judgment therefore for the plaintiff is set aside, and there will be judgment for the defendants with costs.

December, 15th.

1865.
Dec. 15.

Present :—TEMPLE, J., and STEWART, J.

D. C. Colombo, No. 38,059. } *Kelaart* v. *Allen.*

Shipping—consignee and captain—liability of captain for injury to cargo—contributory negligence by consignee.

On appeal by the defendant, the Supreme Court nonsuited the plaintiff in the following judgment :—

In this case a cask of brandy was loaded on board the ship *Nemesis*, of which the defendant was the captain, to be carried from London to Colombo, and then delivered to the plaintiff ; the greater part of the brandy leaked out on the voyage, and the plaintiff now seeks to recover from the defendant £29 2 7, for the damage he has sustained by such leakage. The questions for consideration are,—

1.—Did the injury result solely from the defendant's negligence in stowing the cask in his vessel. (*Waite* v. *N. E. Railway*, Jur. 59, E. C.)

2.—Was the injury occasioned by the plaintiff's negligence alone, (*Martin* v. *Great W. Railway*, 24, L. J. n. s. Com. Pleas, 209.) or,

3.—Did the plaintiff contribute to the injury by his own negligence.

If the first is proved, the plaintiff will be entitled to recover.

If the second and third be proved, the defendant will be entitled to succeed.

Now as to the first question, we do not think that the injury resulted from any bad stowage of the cask in the vessel ; it may be, though such is not clear, the cask was stowed bung downwards, but it clearly appears that the bung was quite sound, and that no leakage took place through the bung.

On the other hand, the evidence clearly shews that the leak was in the head of the cask, that part of the cask being defective.

We therefore are of opinion that the defendant is not responsible for the injury, and that the plaintiff having contributed to the loss by having a bad and defective cask cannot recover for the injury he has sustained.

1866.

February, 6th.

Present :—TEMPLE, J.

P. C. Mallagam, No. 11,709. } *Mudalytamby* v. *Caderasy.*

Offence—taking forcible possession.

PLAINT :—That the defendant did on the 18th day of August, instant, at Punnaley Cattowan, unlawfully take forcible possession of the complainant's land Catteyady, situate at Punnaley Cattoowan.

On appeal by the first defendant against a conviction, the Supreme Court set it aside and dismissed the plaint, as it did not disclose a criminal offence.

C. R. Pantura, No. 5,774. } *Mathes* v. *Mathes.*

Agreement to draw toddy—Ordinance No. 7 of 1840.

In this case, the defendant agreed with the plaintiff to draw toddy for the use of the plaintiff from certain cocoanut trees belonging to the plaintiff for a certain period at his request. The defendant having failed to do so after sometime, plaintiff claimed £10 as damages.

The commissioner held that the agreement ought to have been in writing and notarially executed, and nonsuited the plaintiff.

The Supreme Court set aside the order and remanded the case for further hearing, as follows :—

The Supreme Court does not consider that the defendant had any interest in the land, as contemplated by the Ordinance of Frauds No. 7 of 1840.

C. R. Kornegalle, No. 466. } *Pincha Arachchi* v. *Ibrahim.*

The following judgment of the commissioner fully sets out the facts of this case :—

Servitude—divisions of tenements—implied grant

I consider the facts proved in this case to be these.

The tank or ammuna in dispute originally formed a portion of the field Meegaha Kumbure, and was included within its boun-

daries, but that plaintiff's ancestors converted a portion of the said field into a tank, and used the water to irrigate the field Kahatagaha Kumbure, then forming part of their pangu, but since purchased by defendant; that some 15 years ago defendant repaired the basin of the said tank, which formed the boundary of their field, and that since then defendant has taken water from the tank, and has likewise appropriated the fishes caught therein to himself; plaintiff now asserts his right as owner, and holds that defendant is only a tenant by permission. I do not think that it is material whether special permission was given to defendant to take the water or not: on the division of a tenement mutual grants are implied, if those easements without which the property could not in its new condition be enjoyed by its several proprietors, and I consider that defendant has an easement founded both on implied contract and long user to the water of the tank, but I consider that the extent of this right must be measured by its necessity and that defendant has only a right to so much of the water as is necessary for his cultivation—plaintiff's natural right as owner of the tank being reserved to him, and these rights I consider plaintiff may begin to exercise whenever he will, though he may hitherto have held them in abeyance. In like manner I am of opinion that defendants cannot set up a right by prescription or long user to the proprietor's share of the fishes. He has by user acquired a right to fish, but it must be subject to plaintiff's natural right as owner of the tank and the water therein. It is decreed that the tank, reservoir or ammoone in dispute is the property of the plaintiff, subject to a servitude to supply water for the proper irrigation of the field Kahatagaha Kumbure and subject to defendant's right to catch fishes therein on paying proprietor's share to the plaintiff; under the circumstances each party will pay their own costs.

1866.
March 26.
—
of easement —its nature and extent.

On appeal, the Supreme Court affirmed the decree of the court below.

March, 26th.

Present:—Creasy, C. J., and Stewart, J.

D. C. Jaffna, No. 12,657. } *Kanthar* v. *Sedembranaden.*

The following is the judgment of the Supreme Court:—

In this case, there is no proof and not even any suggestion that the plaintiff's proctor did not write down correctly what was dic-

Arbitration —proctor of party acting

1866. April 12. — as arbitrator's clerk—costs.

tated by the arbitrator, and consequently we cannot set aside the award on account of the irregularity committed by the arbitrator and by the plaintiff's proctor in that respect. But it is to say the least of it, extremely improper and unseemly for the proctor of one of the contending parties to act as arbitrator's clerk; and we shall disallow the plaintiffs any costs of the motion and hearing before the District Court as to making the award a rule of Court and the costs of this appeal.

The other objections to the award are untenable.

Order of the District Court making the award a rule of Court is affirmed, but plaintiff to have no costs in respect of that order or of this appeal as above mentioned.

April 12*th.*

Present.—Stewart, J.

P. C. Matura, No. 45,651. } *Dissanayake* v. *Loku Appu* et al.

Statutable offence—variance between plaint and verdict.

Plaint.—That the defendants did on the 27th instant near the Ambalam, assault and resist the complainant while in the execution of his duty as constable while removing to Matura police station, two bullock carts without license, used by said defendants at Dickwelle, contrary to 2nd section Ordinance No. 1 of 1864 and 17th clause of the Ordinance No. 15 of 1843.

The Magistrate found the first defendant guilty of assault and sentenced him to pay a fine of two pounds, and in default of payment to be imprisoned at hard labour for two months.

The finding of the magistrate was set aside by the Supreme Court, as the charge against the defendant and appellant was laid under distinct clauses of two Ordinances. No breach of either Ordinance was established, consequently the appellant ought to have been acquitted.

There was no charge of assault at common law or irrespective of the Ordinance.

April 19*th.*

Present:—Stewart, J.

P. C. Mulletivoe, No. 5,636. } *Louisa* v. *Sinnatchy.*

Vagrant's Ordinance—disorderly

Plaint.—That the defendant did on the 5th instant at Mulletivoe bazaar, behave in a disorderly manner, in breach of the 2nd clause of the Ordinance No. 4 of 1841.

The magistrate found that as no general disturbance or riot was occasioned by the abusive language of the defendant, she was entitled to an acquittal. 1866. April 26.

On appeal against the order of acquittal, the Supreme Court set it aside and adjudged the defendant guilty, and ordered her to pay a fine of ten shillings, in these terms :—

behaviour—abusive language—riot.

There is ample evidence (which was not disbelieved) that the defendant behaved in a disorderly manner, using abusive and obscene language in the presence of several people in the public bazaar and street. It is not necessary to constitute the offence as charged that there should have been a riot or general disturbance.

April 26th.

Present :—STEWART, J.

P. C. Gampola, No. 253. } *Daly* v. *Selembram* et. al.

The complainant swore an affidavit before the magistrate in which he alleged that defendants left his service without due notice, and prayed for a warrant for their apprehension. One of them was brought up on the warrant, but the magistrate discharged her.

Procedure—necessity of plaint.

There was no plaint filed against the accused. The order was as follows :—

"4th April. The woman Rakky is produced ; being a poor cripple, she is discharged."

On appeal by the complainant, the Supreme Court dismissed the appeal, in these terms :—

It appears on reference to the proceedings that no complaint was entered against the accused, but only an affidavit filed applying for a warrant for their apprehension.

A plaint is essential in every prosecution, the affidavit being merely supplementary for obtaining a warrant in certain cases.

1866. May 3.

C. R. Kandy. No. 34,962. } *De Wass* v. *Pollock.*

Authority to sue—voluntary association.

This was an action to recover the sum of 19*s*., being amount of subscription due by the defendant to the plaintiff as treasurer of the Kandy Young Men's Literary Association, from April 1864 to October 1865. In the answer, defendant admitted that he was once a member of the Association, but that in April 1864 he resigned his membership, and pleaded never indebted. The commissioner nonsuited plaintiff as he had no legal status to appear and sue defendant.

The following is the judgment of the commissioner :—

Plaintiff is honorary treasurer of the Kandy Literary Association, an institution founded for purposes of mutual improvement by the young men of the place, and deserving, the Court takes occasion to observe, of every encouragement and support. It is a purely voluntary body.

The members can therefore be held bound by such rules only as they voluntarily accepted. A body of rules was it appears prepared in which there is nothing to show that an agreement was entered into, constructively or otherwise, by the members, to authorise the sueing of defaulters by any of the office holders The members of the institution were at liberty to form such agreement : not having formed it, the court cannot look upon the two parties now before it as bound by any contract, relatively one towards the other, and cannot as a matter of course make a decree in favour of one against his adversary. Had the agreement suggested been made, the court would have been in a position to recognize the status of a plaintiff duly and legally constituted.

The promise to pay, alleged to have been made by defendants, is not proved. The plaintiff is nonsuited with costs.

On appeal, the Supreme Court affirmed the judgment observing the plaintiff, not having any legal authority to sue, was properly nonsuited.

May 3rd.

Present :—STEWART, J.

C. R. Galle, No. 31,039. } *Louis* v. *Babahamy.*

Lease—Ordinance No. 8 of 1834.

The following is the judgment of the Supreme Court :—

The plaintiff sues for the recovery of £5, advanced to defendant upon a lease of certain cocoanut trees of which defendant did

not obtain possession. The lease was for one year, and is dated 24th December, 1855. The action is not brought until more than nine years after, viz., on March 14th, 1865, and to it the defendant pleaded prescription, 1866. May 23. — clause 3— prescription.

The claim is not upon a "bond conditioned for the future payment of money," nor can it be regarded as founded upon any instrument of the kind referred to in the 3rd clause of the Ordinauce No. 8 of 1834, to which the term of ten years limitation applies.

The action, even if regarded as founded upon a written security not falling within the jurisdiction of instruments set forth in the 3rd clause, cannot be maintained, inasmuch as more than six years have elapsed from the date of liability. Sec 4th clause.

May, 23rd.

Present :—STEWART, J.

P. C. Pangwille, No. 6,619. } *Dureya* v. *Nonohamy.*

This was a charge against a Kandyan woman for retailing arrack, without having first obtained a license for that purpose, in breach of the 29th clause of the Ordinance No. 10 of 1844.

Husband and wife—offence by wife—presumption of wife acting under coercion of husband—in what cases rebuttable.

It was proved that the accused was caught in the very act of selling arrack to two of the witnesses, who were examined in the case. The Vidane, moreover, whilst searching her house, found a quantity of arrack there.

The magistrate acquitted the accused, "because complaïnant ought to have brought an action against her husband on whose account the arrack was sold."

On appeal, the order of acquittal was set aside, and case remanded for further hearing and judgment in these terms :—

It does not appear that the defendant's husband was present when she sold the arrack. It would rather seem from the evidence that he was not.

If the wife, in the absence of her husband, commits an offence, even by his order or procurement, her coverture will be no excuse. 1 *Hawk.* ch. 1 sec. 11.

Further, the presumption of the wife acting under the coercion of her husband "may be rebutted by evidence ; and if it appear "that the wife was principally instrumental in the commission of "the crime acting voluntarily, and not by restraint of her husband, "although he was present and concurred, she will be guilty and "liable to punishment." 1 *Hale,* 516.

1865.
June 5.

June 5th.

Present :—CREASY, C. J., TEMPLE, J., and STEWART, J.

C. R. Colombo, No. 42,133. } *Schocman* v. *Thompson.*

Master and servant—leaving without notice—sufficiency of notice—claim of master to damages for unjustifiable leaving.

The following judgment of the Supreme Court sets at the facts of the case :—

The plaintiff sues to recover £5, being wages due to him from the defendant, for his services as clerk during the month of January 1866. The defendant denies to be indebted, and pleads that plaintiff left defendant's employ without reasonable cause or due notice. The defendant further claims in reconvention £10 as damages caused by plaintiff having wrongfully quitted defendant's service.

The evidence shews that plaintiff was a clerk in defendant's service, employed by the month, and paid on the 1st or 2nd of the following month for the preceeding month. There is no suggestion of ill-usage of the plaintiff or of any disagreement between the parties. According to the evidence, the first intimation the defendant received of plaintiff's intention of leaving him was on the evening of the 31st January, the same day on which the plaintiff attended for the last time. Evidence was also given of damage and actual loss sustained by defendant in consequence of plaintiff's absence. The court below gave judgment for the defendant. The points for consideration are,—

1.—Was notice necessary?

2.—If necessary, was sufficient notice given, and

3.—If plaintiff was not justified in leaving, has defendant made out his claim in reconvention?

It is not denied that the hiring was monthly, but it is contended that the contract ceased on the 31st of January, and that the plaintiff not having entered upon the following month, he was not bound to serve during that month.

It appears to this court that the plaintiff, having no just cause for quitting his service, was bound to give reasonable notice, expiring at the end of the current month, of his intention to determine the engagement. (*Williams* v. *Byrne*, 7 A. & E. 177.) It would be neither just nor equitable for one party by his conduct to induce the other to believe that he intends continuing his engagement, and then suddenly to terminate it without affording that other the means of making the necessary arrangements, to meet such change in their former relative positions.

The inconvenience and positive loss that might accrue to employers as well as to the employed from such unexpected disrup-

tion of hitherto subsisting engagements are obvious. A merchant or tradesman might, on the last day of the month, leave his office or stores in the full confidence that the clerk would as usual attend next day, to learn, on the following morning, possibly when elsewere, that his whole establishment had left. 1866. June 14.

As respects the second question, it was conceded in the argument, as it could not but be, that if notice was necessary, the notice given on the 31st January was altogether insufficient.

It only remains to consider whether the defendant has proved his claim in reconvention. He in his evidence explicitly states that he was not only greatly impeded in his business by plaintiff abruptly leaving him, but also declares that he suffered (and he states how) actual loss to a greater amount than £10 for which sum he obtained judgment. This court sees no sufficient reason for reducing the damages, especially as the plaintiff, it would appear, left the defendant's service having secured higher wages elsewere.

The judgment therefore must be affirmed.

June 14th.

***Present*:**—Creasy, C. J. Temple, J. and Stewart, J.

D. C. Batticaloa, No. 14,265. } *Philip* v. *Barthelot.*

Slander, verbal—reiteration in pleadings—conduct of case by counsel—failure of proof—damages.

This was an action for the recovery of £75, for defamation of character, by verbal slander. The district judge thought the case too trivial to come before this court. "To take a contrary view and enter up judgment for the plaintiffs, would be to open a door to any one, no matter of what character, to rush into the court, and put parties to the expense of heavy costs. It is well known, that such language as that imputed to the defendant, is quite common, especially to the lower classes of natives in this country." The court therefore dismissed the libel, and cast plaintiff in costs.

Against this judgment plaintiffs appealed.

On appeal the Supreme Court set aside the decree in these terms:—

The Supreme Court would be sorry to encourage the bringing of action for defamation in mere cases where low words of common abuse are spoken hastily by persons who are quarrelling with one another, but in the present instance the defendant has by his amended answer, deliberately reasserted his offensive imputation on the second plaintiff's character, and the cross-examination to which she

1866. June 15. — was subjected by his advocate, was of the same offensive description. He has wholly failed to prove the truth of what he has thus persevered in asserting, and the plaintiff is clearly entitled to a verdict and damages.

The judgment of the district court of Batticaloa of the 26th day of July, 1865, is set aside, and judgment entered up for plaintiff for £5 damages, and full costs."

June 15th.

Present :—Creasy, C. J. Temple, J. and Stewart, J.

D. C. Galle, No. 23,284. } *Oriental Bank Corpn.* v. *Sonnenkalb* and another.

Promissory note—notice of dishonor--immediate indorsee—remote endorsee.

The decree of the court below was set aside as follows:—

It appears to the Supreme Court, that the decision in this case, is erroneous. The Bank gave notice of dishonour in sufficient time to their immediate indorsee, Mr. Sonnenkalb ; and if Mr. Sonnenkalb gave notice in sufficient time to the party who had indorsed to him, the Bank is entitled to avail themselves of that notice by Sonnenkalb, and to sue the remote indorsee.

The Supreme Court thinks that there is abundant evidence of such notice having been given by Sonnenkalb, and also that the defendants were acting as administrators, at the date of that notice ; so that the delay in the formal issue of the letters of administration, is no defence in this action.

Judgment entered for plaintiffs for amount of note and interest.

D. C. Kandy, No. 33,964. } *Wegoddepolle* v. *Andris Appu.*

Kandyan law—interest of widow in the family paraveni property.

The following is the judgment of the Supreme Court :—

The question as to the nature of the interest taken by a Kandian widow in landed property, was very fully considered in D. C. Ratnapura, No. 662½, decided by the Supreme Court on the 3rd December, 1861.

The decisions before that time had been conflicting, and it was the wish of the Supreme Court to establish a permanent rule on the subject. The Supreme Court then decided, that with respect to the family paraveny property, the wife has merely a right to main-

tenance by the heirs, who takes possession of such property, and that she does not acquire a life estate in it. 1866. June 21.

With respect to landed property acquired during the marriage, her rights are different, as is pointed out in the Ratnapura case.

The Supreme Court considers the case in *Morgan, Conderlag,* and *Beling,* p. 328, and other cases that might be cited, to have been overruled by the Ratnapura decision, to which we adhere.

It follows that, in the present case, the heir had a possessory estate, in the paraveny lands immediately after the father died, and that the time of prescription against him runs from that date.

June 19th.

Present :—CREASY, C. J., TEMPLE, J., and STEWART, J.

D. C. Caltura, No. 19.636. } *Pieris* v. *Pieris.*

The following is the judgment of the Supreme Court :—

Tortious legal proceedings—proof of malice—sufficiency of averment to injure.

The Supreme Court thinks that this case was properly dismissed. It is a general principle that in order to maintain an action for wrongful prosecution of civil suits without probable cause, the complaining party must aver and prove that the person who took these proceedings against him, did so out of malice. See *De Medina* v. *Greve,* 15, *L. J. Q. B.* 284. In the present case there is neither allegation nor proof of malice.

The mere averment of intent to injure is insufficient, as will be seen from the argument and judgment in the English authority already referred to.

June 21st.

Present :—CREASY, C. J. TEMPLE, J., and STEWART, J.

D. C. Colombo No. 33,239 } *Deonis* v. *Weebada Arachchi.*

Co-heirs—prescription—Roman Dutch law—Ordinance No. 13 of 1822, and 8 of 1834.

The following judgment of *Lawson,* D. J., sets out the facts of the case :—

The plaintiff in this case claims $\frac{1}{3}$ of certain lands, late the property of one Don Daniel, as one of his heirs. He alleges that he is the only son of this Don Daniel by his second wife, Don Daniel having had two children by his first marriage. Plaintiff would therefore be entitled to $\frac{1}{4}$ of the whole estate in right of his mother and to $\frac{1}{3}$ of $\frac{1}{4}$ as one of the three heirs of his father, making in all $\frac{1}{3}$ of the whole estate.

The two defendants, who are the husbands of the daughters of

1866. June 21.

Don Daniel by his first wife, plead first that plaintiff is not the son of Don Daniel, secondly that defendants have been in the sole and exclusive possession of the lands mentioned in the libel, since the death of Don Daniel in 1839, and are therefore entitled thereto by prescription. Thirdly that the plaintiff ought not to maintain this action, because it was not brought within five years of the death of Don Daniel.

Plaintiff joins issue with defendants on the first plea, and as to the second he pleads minority.

The plaintiff has proved to the satisfaction of the court that his mother Adriana was married to Don Daniel on the 12th of January 1829, and that he, the plaintiff, was born afterwards.

As to the date of the plaintiff's birth, the evidence is not so satisfactory, but supposing him to have been born at the earliest period in regular course after his father's marriage, this would fix his birth in the month of October 1829, and he would have attained his majority in October 1854, and therefore the period of prescription of ten years would not have expired at the date of action brought, viz. August 1864. This is not exclusive proof as to the date of his brother, but the weight of the evidence is in favour of a period still later. The plaintiff's witnesses state his age at the time of his fathers death to have been 3 or 4, 5 or 6, 8 or 9 years. Now the eldest of there ages would fix his birth in 1830, and bring him within the period which would save prescription. The court therefore holds that the plaintiff was not 25 years old until after the 31st August 1864, on which day the libel was filed.

With regard to the plea that the action for the recovery of the plaintiff's share of his father's estate, is not brought within 5 years of the father's death, the court holds it to be bad in law. In the first place, it may be doubted whether the whole of the Dutch law on the subject of prescription is not abolished by the Ordinance No. 13 of 1822, in the repealing clause, which is saved from the operation of the clause in the Ordinance No. 8 of 1834, by which the remainder of that Ordinance is repealed. And in the second place, the prescriptive term of 5 years applies by the Dutch law only to three froms of action, in the *querela de inofficioso testamento*, the accusation of adultery, and to the petition of an heir to have his property separated from that of his testator or intestate, in other words, to the case of a petition by an heir who has adiated an inheritance to be allowed the benefit of inventory and the consequent protection of his own property from liability for the debts of the deceased. See Voet, xliv. 3. 7. There appears to be no reason for saying that an heir will be deprived of his inheritance by any shorter period of adverse possession than would have applied, if he had himself been ousted from possession.

1866. June, 29.

The court therefore holds that the plaintiff has established his title, and that defendants have failed to prove that he is barred by any Ordinance or law relating to prescription. Judgment for plaintiff with costs.

On appeal, *Dias* for appellant, *Lorenz* and *Alwis* for respondent.

The Supreme Court affirmed the decree of the court below "for the reasons given in the judgment of the court below. The old decision of the High Court of Appeal, to which our attention has been drawn, was distinctly overruled in D. C. Colombo, No. 1, South 19,620,* decided by the collective Supreme Court on 24th April, 1839."

June, 29th.

Present :—Creasy, C. J., Temple, J., and Stewart, J.

P. C. Pantura, No. 7,096. } *Carolis Appu* v. *Appuhamy* et al.

The following is the judgment of the Supreme Court :—

Jurisdiction—greater and lesser offence—discretion of Supreme Court to quash proceedings for excess of—under what circumstances such discretion exercisable.

There is nothing made to appear on the part of the appellants to shew that they were not properly convicted of assault. We have, however, been much disposed to quash these proceedings, and to direct proceedings to be taken before a justice of the peace, under the 18th clause of the Police Ordinance, inasmuch as one of the witnesses speaks of a knife having been used, and stabbing cases are beyond the jurisdiction of a police court. It may, however, be that the police magistrate disbelieved the evidence as to the use of the knife, though he believed that an assault had been committed, and we do not therefore feel compelled to quash the proceedings on the ground of the offence having exceeded the police magistrate's authority.

See the judgments of Baron Bramwell and Baron Channell *in re Thompson*, 19 Magistrates' Cases, 30 L. J. We think that we have some discretionary powers in these matters, and that whenever it is reasonably possible to suppose that the evidence about the greater crime was disbelieved, while the police magistrate believed that the minor offence was really committed, we are not absolutely bound to

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* See *Morgan*, *Conderlag* and *Beling's Digest*, p. 272 *et seq*, for the judgment of the Supreme Court on this case.—Ed.

1866. July. 3rd.

quash the conviction. If we had been obliged to set aside these proceedings, and send the parties back for new proceedings to be taken before a justice of the peace, we should have done so with much regret, on account of the great and grievous delay to which the parties have been already subjected, through the long and repeated adjournments in the police court. The case was instituted on the 17th July, 1865, and protracted to the 21st June, 1866, by a series of postponements, which we shall take care to bring before the notice of the highest authority in the island.

July, 3rd.

Present :—Creasy, C. J., Temple, J., and Stewart, J.

D. C. Tangalle, No. 1,970. } *Louis* et al v. *Louis.*

Co-heirs—claim by prescription—nature of proof of possession.

The following is the judgment of the Supreme Court :—

This court in its former judgment decided that the present defendant admitted in the action in 1843, that he was only entitled to certain fractional parts of the land of which he now claims the whole. The Supreme Court sees no reason to disparage the effect of that admission as against himself, which operates strongly against the defendant's claim by prescription.

A man having a right to fractional parts, would naturally be resident on part of the property, and would take some of the produce, without exercising or claiming any right over the residue. When it appears that a claimant to a whole property originally came upon that property as a mere part owner, he ought, in order to gain a title to the whole by prescription, to give very strong evidence of subsequent possession of the whole to the exclusion of the other original part proprietors. That certainly has not been done here. The fractional claims of the plaintiff, and the fractional claims and admissions of the defendant do not wholly agree ; but the Supreme Court thinks that substantial justice will be done by adjudging the first four plaintiffs to be entitled to two-thirds of five-sixths of the eastern portion as claimed.

We do not consider the rest of the plaintiff's claim to be proved.

July 10*th.*

CREASY, C. J., TEMPLE, J., and STEWART, J.

P. C. Chavagacherry, No. 7.790. } *Tillenayagam* v. *Cander.*

Theft—landowner and cultivator.

The charge of theft was dismissed in these terms by the Supreme Court :—

It appears from the evidence that the defendant is cultivator of the land, receiving one-third of the crop. It was his duty to reap and thresh the paddy ; and if he has not given complainant her due share of the crop, the not having done so is the subject for a civil action but not for a charge of theft.

D. C. Ratnapura, No. 8,142. } *Bologna* v. *Punchi Mahatmeya.*

On appeal, *Lorenz* for appellants, *Alwis* for respondent.

Kandyan law—deed of gift—revocability of.

The Supreme Court affirmed the decree of the court below in these terms :—

It is impossible to reconcile all the decisions as to the revocability or non-revocability of Kandyan deeds ; but the Supreme Court thinks it clear, that the general rule is, that such deeds are revocable, and also that before a particular deed is held to be exceptional to this rule, it should be shewn that the circumstances which constitute non-revocability appear most clearly on the face of the deed itself. The words in the present deed as to services "continued to be rendered by the donee" do not appear to the Supreme Court to be sufficiently clear and strong.

July 17*th.*

Present :—CREASY, C. J., and STEWART, J.

D. C. Kornegalle, No. 130. } In re guardianship of *Fidelis* and others. *Godlieb,* guardian appellant.

Dias for appellant.

Lorenz for respondent.

The order appealed from was set aside in these terms :—

Bequest by will—sale by legatee—duty of

The Supreme Court thinks, that this decision must be reversed, and the administrator directed to join in the conveyance as prayed. Nothing has occurred to divest the administrator of the legal estate

1866. July 24.

administrator to join in conveyance.

which vested in him by the letters of administration ; and no prudent purchaser would complete a purchase, unless the administrator joined in giving him his title. The practice of the Colombo court in this respect is, to require the concurrence of administrators, and other district courts should do the same. It is ordered that the administrator do join in the conveyance as prayed.

July, 24th.

Present:—Creasy, C. J., and Stewart, J.

C. R. Gampola, No. 20,629. } *Kahan* v. *Thwaites.*

Carriage hiring—duty of owner to take care of things left in the carriage—his liability for negligence of servant.

On appeal preferred by the plaintiff, the Supreme Court delivered the following judgment :—

It appears that the plaintiff who lets out carriages and horses, let a horse and carriage to defendant, to take him from Gampola to Kandy and back. According to common usage, and what must have been the understanding between the parties, the defendant had a right to take with him any extra articles of wearing apparel, such as a Mackintosh cape, which might be required during the journey in case of bad weather. The plaintiff sent a servant of his own in charge of the conveyance, whose duty it was to attend to it ; and the Supreme Court thinks that it was part of the implied contract between the parties, that this servant should attend to reasonable directions given by the defendant connected with the purpose for which the carriage was hired ; and that the servant, even without special orders from the defendant, should be reasonably careful in attending to the safety of the persons and things conveyed in the carriage.

If the defendant had employed this servant in any matter not connected with the journey, the plaintiff would not have been responsible for any misconduct or negligence of the servant in such extraneous employment. But the taking reasonable care of the defendant's things left in the carriage during defendant's temporary absence from the carriage in Kandy, was a matter within the contract, and within the scope of the servant's employment. There is evidence that such reasonable care was not taken, and that the cape was lost through the servant's negligence. For this the master has been rightly held responsible.

July, 26th.

1866. July, 31.

Present :—CREASY, C. J., and TEMPLE, J.

C. R. Gampola, No. 20,635. } *Kershaw* v. *Kennedy.*

Coffee estate—supply of goods—liability of superintendent, under what circumstances.

In this case plaintiff recovered judgment in the court below against defendant for goods sold and delivered to one Booth, who was at the time superintendent of defendant's coffee estate, called "Moorootie." Plaintiff declared that the "Moorootie estate" was debited with these goods ; that the superintendent had before this ordered goods for the estate, but had paid for them himself.

On appeal, *Ferdinands* appeared for defendant appellant.

The Supreme Court set aside the decree in plaintiff's favour, and non-suited him in these terms :—

There is no evidence to shew that the defendant gave Mr. Booth authority, either express or implied, to buy goods on his, the defendant's, credit.

If it was sought to fix the defendant under an assumed general liability as proprietor of an estate to pay for things ordered by the superintendent, the plaintiff ought to have given copious and clear evidence as to the general nature of superintendent's appointments and duties, as to the general mode of settlement between them and their principal, and especially as to the general custom whether the principal supplies the superintendent in advance with money to carry on the estate, or whether he leaves him to get supplies on credit. No evidence of the kind is given here ; and the plaintiff is nonsuited accordingly.

July, 31st.

Present :—CREASY, C. J., TEMPLE, J., and STEWART, J.

D. C. Colombo, No. 34,920. } *Ramen Chetty* v. *Joedt.*

The decree in plaintiff's favour was set aside in the following judgment of the Supreme Court :—

Action on bond—part illegal consideration—forbearing criminal

Part of the consideration for the bond in this case, was an undertaking to forbear criminal proceedings against a thief. The late learned acting judge of the Colombo district court, held, that such a consideration, though illegal by English law, was not so by Roman Dutch law.

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proceedings against a thief—English law—Roman Dutch law.

The Supreme Court thinks that this holding was wrong. The district judge seems to have been led to it by reference to some passages in *Voet* and *Grotius*, which speak of its being illegal to engage to remit the punishment of a crime not then yet accomplished. It was argued thence, that if the crime had been accomplished, a contract to remit the punishment would be good. But this argument seems to the Supreme Court to be quite erroneous.

The instance cited from *Voet* and *Grotius* is given by those authors to exemplify the rule that contracts are illegal, the object of which is to tempt to future guilt or immorality. They nowhere say that it is legal to bargain for impunity for past offences, and to thwart the course of justice by causing the proceedings in a criminal court to be dropped in consideration of a private payment. A man's right to compromise a civil action brought by him, to get a compensation in money for the effects of an offence committed against him, may be a very different matter. But the object of criminal proceedings is to be repress crime, and to protect the public by bringing criminals to justice. To aid in this is a public duty. To impede or corruptly neglect this, is an offence against the public : and a bond given to induce a man to do so, is really a bond given to induce them to commit an offence. It is clear to us that such practises are forbidden by the Roman Dutch Law as strongly as by the laws of England. Voet's words are unmistakeable. He lays it down as a general requisite for contracts being enforceable in the courts of law, that they must be " negotia non juri publico contraria, quæve ad publicam spectarent læsionem, (2. 14. 16.) It cannot be said that it would not be contrary to justice and injurious to the community, if bonds like the present were upheld, and if wealthy criminals were thereby enabled to break the law with impunity, inasmuch as it would be open to them, when detected, to make effective bargains with their prosecutors, and so clog the course of justice with their gold.

We were referred to an English case, *Keir* v. *Leeman*, 6 Q. B., 308, in support of the proposition "that the law will permit a " compromise of all offences though made the subject of a criminal " prosecution, for which offences, the injured party might sue and " recover damages in an action." But the same learned judge who in that case used those words, added as follows :—" But if the " offence is of a public nature, no agreement can be valid that is " founded on the consideration of stifling a prosecution for it."

Now the offence in the present case is theft, and that offence is certainly of a public nature, for the honest part of the public have a direct and most urgent interest in the repression and punishment of thieves.

Judgment for defendant.

August, 11th.

1866. August 11.

Present :—Creasy, C. J., and Stewart, J.

D. C. Kandy, No. 41,504. } *C. M. Bank* v. *Silva & Co.*

Cheques, post dated—action on—innocent holder.

Lorenz for plaintiff appellant.

Dias and the *Queen's Advocate* for respondents.

The following is the judgment of the Supreme Court :—

This is an action by the plaintiffs, as transferees, against the defendant, as drawer, of two dishonored cheques, one for £200, and the other for £150, drawn in favor of Mahammado Lebbe or bearer.

No time for payment being specified in the cheques, they were payable on demand. Each cheque had a penny stamp only.

The district judge has found against the plaintiffs. He refers, for reasons to his judgment in the connected case No. 41,503. He means, of course, that part of that judgment which refers to the post dating of cheques, and we must take the district judge to have decided the present case on the general ground that the cheques sued on were post-dated, and that post-dated cheques are invalid.

Had it not been for some recent English decisions which have been brought to our notice, we should probably have agreed with the district judge in that general ruling.

But in *Whittaker* v. *Foster*, 32 L. J. C. P. 161, the court of Common Pleas decided that the innocent holder of a cheque, which on the face of it appeared to be duly stamped, was not deprived of his right against the drawer by the fact of the cheque being post dated.

The Court of Queen's Bench in *Austin* v. *Bunyan*, reported in the *Weekly Reporter*, and also in the *Law Journal* for 1865, has decided the same way,—though the Queen's Bench Judges stated that they were not satisfied as to the correctness of the previous decisions, but felt bound by their authority.

We, of course are strictly bound to follow these authorities, as far as they go, but there is no obligation on us to go any further. In these decisions the holders of the cheques, who sued successfully on them, are expressly stated to have been innocent holders, that is, to have taken their cheques without knowledge that the cheques were post-dated.

It has nowhere been held that the man who received a post-dated cheque with knowledge that it is post-dated, shall be allowed to sue on it. We certainly are not going to introduce such a doctrine.

The Stamp Ordinance (11 of 1861) makes a penny stamp sufficient for a cheque payable on demand. If it be payable otherwise

1866. Aug. 11. than on demand, a stamp of much higher amount, on a graduated scale according to the sum, is required.

Clause 18 of the Ordinance imposes penalties on all who issue post-dated cheques, payable on demand, not duly stamped, and on all who knowingly receive them.

The drawer of a post-dated cheque, and the taker of it from him, who knowingly receives it in that state, both commit an illegal act, from which the taker can acquire no right of action ; and as between them the cheque is certainly invalid, as being insufficiently stamped to their knowledge.

If the second taker receives the cheque from the first taker, knowing also that it is a post-dated cheque, the second taker is in no better position as to right of action than the first taker could be. The second taker, in knowingly receiving the post dated cheque, commits an illegal act for which he is made liable to an express penalty under th 18th clause of the Ordinance. The second taker also takes a cheque, which is, to his knowledge at the time, insufficiently stamped.

We cannot consider that he can have a right to maintain an action on it.

There is no question that in the present case the cheques were dost-dated. But applying the law as has been above stated, we have also to ascertain the fact whether the plaintiffs, when they received the cheques, knew of the post-dating or whether they were innocent, that is, unconscious recipient of securities which appeared legal and regular on the face of them, but which in point of fact were objectionable on account of post-dating.

It was not desirable, nor was it wished on either side, that the case should be sent back to the district court for further inquiry and express adjudication on this point ; but as all the evidence likely to be available was already before the court, the case was argued before us as to this question of fact, and we took time to enable ourselves to make a full investigation of the proofs adduced as to this matter.

We have now carefully examined the evidence, including the evidence taken in case No. 41,503 (which by consent was taken in evidence, so far as applicable in this case also), and we are of opinion that the plaintiffs (that is, the plaintiff's agent at Matelle, who acted for the plaintiffs in this matter) must have known when he received these cheques, that they were post-dated cheques.

These cheques were brought by the payee, Mohammadoe Lebbe, to the plaintiff's agent on the 18th of October. The money was given for them on the 19th. But even taking the 19th as the date of the receipt in point of law, we are convinced that the plaintiff's

agent knew that the cheques, which were cashed on the 19th, were the same, that had been brought on the 18th. 1866. Augt. 11.

This settles the matter as far as regards the first cheque in this case, which purports to be dated on the 19th; with respect to the other cheque which purports to be dated on the 18th, there is proof that the cheques were brought and given to the plaintiff's agent, enclosed in a letter from one Ariacootty at Kandy, respecting them, and that Aricootty's letter bore date as of the 17th.

This and the fact of the second cheque being in company with another cheqne, the post-dating of which was self-evident, give, we think, ample notice to the plaintiff's agent that the second cheque was a post-dated one.

We consider that on these facts, the plaintiff had no right of action against the defendants.

The judgment against the plaintiffs is accordingly affirmed.

D. C. Negombo, No. 1,421. } *Sillani* v. *Corea*, et al.

Roman Catholic church—right to appoint officiating priests—right to the temporalities—presumption in favour of usage in absence of proof of founder's intentions.

Lorenz and *Cayley* for the plaintiff appellant.
Dias and *Berwick* for the defendants appellants.

The following is the judgment of the Supreme Court :—

There are two main subjects for consideration in this case.

The first is, who has the right to appoint the officiating priests of the church ? 2nd.—Who has the property in the fabric, the land and other temporalities ?

The plaintiff claims both these in his ecclesiastical character as Roman Catholic pro-administrator of the Southern Vicariate of Ceylon ; adding in his amended libel a prayer in the alternative, that the property may be declared to be either in him or in the officiating priest appointed by him.

The defendants deny this, and say that both the right to the appointment of officiating priests, and the right to the temporalities, are vested in trustees on behalf of the people of Negombo, appointed from time to time.

We quite agree with the learned district judge in his last judgment, that the plaintiff has given abundant proof that he and his predecessors in office, have for a long time appointed the officiating ministers of this church.

The defendants have given no proof of any value in support of their counter assertion in this matter. They have tried in the

1866. Augt. 11. argument of this case to dispute the plaintiff's title by objections quite besides the merits as between these parties. These objections were based on alleged differences between the ecclesiastical position of some of the plaintiff's predecessors, who were Vicars Apostolic, and others who were Vicars-General. The Concordat of 1857, gives an answer to these objections. But even without it, the substance of the plaintiff's claim is made out ; and it is clear that the appointments have been made by the chief local dignitary of the Roman Catholic Church for the time being,—which the plaintiff is at the present time.

We think that the plaintiff's right to make these appointments is supported not only by the law of prescription, but also by the principle that when the court has to direct what shall be the management of a religious institution, it will, in the absence of express proof of the founder's intentions, look to what has been the usage of the congregation and ministers and others officially interested in the subject ; and the court will, in the absence of any proof to the contrary, presume that such usage has been in conformity with the original design.

We therefore affirm the first part of the district judge's judgment, which is in favour of the plaintiff, as to the right of appointment.

With regard to the temporalities, the district judge has directed that they shall be vested in certain trustees. No party to the suit asked the judge to decree this, and he has given no adjudication on the issues raised as to the property in the temporalities.

Both the parties now before the court have appealed upon this part of the judgment, and it must be set aside.

It appears to us that the evidence shews the property in the temporalities to be in the priest appointed by the plaintiff to officiate in the church. This point is not as clear as the other, but a careful examination of the evidence leads us to think that the proprietory right is in the priest, rather than in the plaintiff, who appoints the priest. We think that the defendants have entirely failed to make out their allegation of the proprietary right being in the congregation's trustees.

There are numerous witnesses called on the plaintiff's side, who speak distinctly to the constant exercise of the proprietary right by the priests. We do not think that this is overborne by the evidence, that one occasion the Bishop, at the request of the congregation, appointed trustees to manage the revenues, who only acted for a few months. Nor do we attach much weight to the priest's accounts being shewn to the people as well as to the Bishop. It is to be remembered that the revenues of this church consist

almost, if not altogether, entirely of voluntary contributions. The fish-rent is a purely voluntary contribution. It is perfectly natural that the ecclesiastical rules of the church should stand to keep the good opinion of the congregation, and above all else, care to satisfy them, that the money which the congregation contributed, was properly spent and honestly accounted for. Nor is there much in the fact that the congregation were liberal enough to re-build the church, when the priest thought that a repair would be enough. The priest evidently consented to avail himself of the congregation's liberality, and it is in our own judgment clear, that it was the priests who ordered and directed the re-building.

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The fact of the priest shewing his accounts to the Bishop, and evidently defering greatly in all matters to the bishop's opinion does not, we think, shew the proprietary right to be in the Bishop rather than in the priest. It is to be remembered that the priest is not appointed for life, or for any term certain, but can be changed at the Bishop's discretion. It seems to us natural, that the Bishop should watch over the management of the temporalities by the priest for the time being, and that the priest should seek to be on good terms with the Bishop, without our holding that the Bishop had the proprietary right, as well as the right of appointment.

No evidence having been given about the alleged moveables, or as to damages, no adjudication on those heads was necessary.

Judgment for plaintiff to stand, but to be amended as follows :—

1.—It is decreed, that the plaintiff as pro-administrator of the Southern Vicariate of Ceylon be declared, and he is hereby declared to be entitled to appoint from time to time as may be needful, Roman Catholic priest or priests, to officiate in the Roman Catholic church of Doowe in the libel mentioned.

2.—That the said church and premises (excepting the moveables) in the libel mentioned are hereby declared to be the lawful property of the officiating priest for the time being so appointed by the plaintiff as aforesaid ; such church and premises to be held by the said officiating priest in trust for religious purposes only, including the maintenance and repair of the said church, and other similar matters connected therewith.

3.—That such officiating priest, so appointed as aforesaid, be restored and quieted in possession of the said church and premises.

Each party to bear his or their own costs.

1866.
Sept., 17.

August, 30th.

Present :—CREASY, C. J.

C. R. Colombo, No. 44,372. } *Daniel* v. *Schumacher,* et al.

Fiscal—security bond to—assignment by fiscal to successful claimant—notice to deliver goods—terms of security bond.

In this case plaintiff sued out writ No. 42,209, and seized certain goods of his execution debtor. The first defendant claimed them, and the second defendant became his security. On the claim being set aside, the fiscal issued a notice to the first defendant to deliver possession of the goods to satisfy the writ. He having failed to do so, the fiscal assigned the bond entered into by the defendants to the plaintiff. The first defendant allowed judgment to be entered against him by default. The second defendant's proctor contended that as no notice to deliver the goods was issued by the fiscal to the second defendant, the plaintiff had no action against him. The commissioner, on that ground, absolved the second defendant with costs, and entered judgment against the first defendant.

On appeal, the decree against the first defendant was modified, and that against the second defendant set aside.

The following is the judgment of the Supreme Court :—

The condition of the bond is, that on its being decreed that the goods are liable for the debt, the obligees shall deliver them over to the fiscal.

There is no stipulation for request or notice. The second defendant admits the bond and the breach of the condition, and there should be judgment against him.

Judgment against both defendants for the amount of the penalty in the bond to be reduced to one shilling, if the defendants deliver up the goods, in good condition, within ten days.

September, 17th.

Present :—CREASY, C. J., and STEWART, J.

Assignees—rate of remuneration to—on what principles to be allowed.

D. C. Kandy, No. 167. } In the matter of the Insolvency of *Sinne Lebbe Brothers.*

The order of the court below was set aside in these terms :—

Cayley for appellant *Lorenz* for respondent.

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The only matter remaining for adjudication in this case, is the objection made by the appealing creditors to the sum allowed for remuneration to the assignees.

Five per cent has been allowed, which in the present case has been estimated as giving to the assignees £4000, that is £2000 each.

They were appointed on the 18th of January, 1865; the certificate was granted on the 4th of July, 1865. An opportunity was given to the assignees to prove, if able, that they had incurred any special risk or taken an unusual amount of trouble in this case, so as to entitle them to a peculiarily high rate of remuneration.

Some evidence was given of their having carried on the management of the estate for a short time and thereby incurred some personal responsibility, but we do not think it was proved that they incurred such remarkable burden or jeopardy as to make this an exceptional case.

We certainly think that £2000 each for the trouble of assigneeship is too much, especially in a bankruptcy where the secured creditors are not paid in full, and the unsecured creditors do not get a farthing.

We have been pressed with the necessity of some general scale of remuneration for assignees being framed and recommended for general adoption; and after much enquiry and consideration, we have prepared one. The principle on which it is based is that of graduating the rate of per centage in a decreasing ratio to the amount of the estate.

It is notorious that small estates are far more troublesome in proportion to their amount than large ones are; and it is usual in trades and offices for those who manage the sale of property, and the winding up of firms and companies, if they are paid by commission, to be paid according to this principle.

We recommend as follows:—

Where the insolvent's estate does not exceed £1000, the assignees to receive a commission of five per cent.

Where the estate exceeds £1000, but does not exceed £3000, the commission to be five per cent on the first thousand, and three per cent on all beyond.

Where the estate exceeds £3000, the commission to be five per cent on the first thousand, three per cent on the second and third thousand, and two per cent on all beyond.

We recommend this as a general rule only, subject to variation in special cases; but we think that very strong proof of assignees having necessarily incurred peculiar trouble and risk should be given, before any larger sum is allowed.

1866. Sept. 17. — This commission is to remunerate the assignees for their personal trouble and loss of time. It is not to include their right to be repaid for money necessarily paid by them out of pocket, as for law expenses or the like. The assignees are entitled to have such money paid back to them, as part of the expenses of working the insolvency proceeding; but the courts should take care not to sanction unnecessary expenditure, and not to allow the assignees to be repaid the cost of employing agents to do anything which the assignees might, in consideration of the commission they receive, be fairly and reasonably expected to do themselves.

The present order is set aside so far as regards the amount of commission, and it is decreed as follows :—

That the assignees receive a commission to be calculated on the principle and scale above stated ; and that they be also repaid any sums which they can satisfactorily prove to the district judge to have been *bonâ fide* and necessarily expended by them with reference to the insolvent estate.

Each party to be at liberty to apply to this court for further directions if required.

P. C. Badulla, No. 10,379. } *Somerville* v. *Cadersaibo.*

The conviction in this case was affirmed as follows :—

There is no doubt that every inhabitant of this island is entitled to the peaceable exercise of his religion ; and when parties are really and *bonâ fide* engaged in their religious rites, and not making them a pretext for malicious and designed annoyance to a neighbour, they ought to be protected and not punished, by law.

We think also that this is a matter in which all parties ought to bear and forbear very much with each other, and it is not because the noise of loud nightly prayers, or loud nightly psalm—singing or the like, is disagreeable to a sensitive neighbour of a different creed, that the penal clause of this Ordinance should be put in force against those engaged in their prayer or psalm. We should have hesitated much before we confirmed this conviction on account of what was proved to have been going on in the defendant's house at the time when the complainant first expostulated about it. But the subsequent scene of yelling and stone throwing, in which there is proof of the first defendant's participation, is clearly within the Ordinance, and conviction is accordingly affirmed.

C. R. Kornegalle, No. 10890. } *Jayatilleke* v. *Worthington.* 1866. Sept., 17.

The decree of the court below was set aside on plaintiff's appeal, and case remanded for hearing in these terms :—

In this case, the plaintiff has been nonsuited on the ground that the defendant was a government officer, and acting under orders. We think that the judgment given by this court on the subject in *Mathes* v. *Barton*, reported in *Joseph* and *Beven*, p. 39, is right, and it is accordingly decreed as above.

C. R. Colombo, No. 43,832. } *Nallatamby* v. *Nallappa.*

Contempt of court—attempt ot deceive by false evidence.

The order fining the plaintiff and his witnesses was set aside, in these terms :—

The Supreme Court has repeatedly pointed out the necessity of caution and forbearance in the employment by judges and commissioners of the power of committing for contempt, although the existence of such a power is indispensable for the due administration of justice, and it ought to be firmly put in force on proper occasions. But it would be hazardous in the extreme to give a general sanction to the use of this summary punishment, as it has been used by the commissioner of the court of requests on the present occasion, for such a merely constructive contempt, as the attempt to deceive the court by false evidence. Without saying that there never can be cases of such flagrant and insolently audacious falsity as to amount to contempt of court, we have no hesitation in saying, that such cases must be very extreme and very rare; and that the present case is not one of them.

It may be well to bear in mind, that mere falsehood does not amount to prevarication, and we would draw attention to the valuable advice as to committals for contempt, which is contained in the judgment of the Supreme Court, delivered by Sir William Rowe, on the 3rd of June, 1857, in case No. 18,928, C. R. Jaffna, which is reported in part 2 of *Lorenz* Rep., p. 85.

1866. October 9.

D. C. Jaffna, No. 15,369. *Irulappa Chetty* v. *Manikam.*

Contempt of court—false statement.

The order imposing a fine on the defendant was set aside in the following judgment :—

Great caution must be used in exercising the power of committing for contempt of court, when the supposed contempt does not consist of *direct insult to the judge*, but of a merely constructive contempt, such as that of making a false statement. For the judge to punish such falsity by summary fine or committal, is to take away from the accused the benefit of trial by jury, attention may be usefully directed to the remarks as to contempt of court, which are to be found in Stephen's Blackstone vol. 4, p. 891, and to the judgment delivered by Sir William Rowe in this court, in case No. 18,928, C. R. Jaffna, reported in the second part of *Lorenz's* Rep. p. 85.

October, 9th.

Present :—Temple, J., and Stewart, J.

P. C. Pangwille, No. 7,622. *Kiri Ettena* v. *Manick Ettena.*

Defendant's expenses—proctor's fees.

In this case the defendants were acquitted by the police magistrate, and the complainant ordered to pay the defendant's expenses in travelling and engaging counsel to defend.

The expenses were taxed at £1 3, of which £1 was as proctor's fees.

The complainant appealed against the order to pay £1 proctor's fees, as the Ordinance No. 13 of 1861 gave the police court power only to allow the reasonable expenses of the defendants and their witnesses, but not the proctor's fees.

The Supreme Court affirmed the order, seeing no reason to the contrary.

D. C. Colombo, No. 42,686. — *Ra. Ma. Pa. A. Sevugan Chetty* v. *Ka. Ru. Chu. Colapan Chetty.* — 1866. Oct. 11.

Pro note—principal and agent—partnership—custom of chetties—form of signature—liability thereon.

Action on pro note :—" That the defendant by his pro note dated 19th February, 1864, now overdue, made and granted by Ka. Ru. Chu. *Palaniappa* Chetty, his agent lawfully authorized in that behalf, promised to pay to the plaintiff twenty days after date the sum of £100. Yet the defendant hath not paid the same."

And the usual money counts followed.

The defendant denied that Palaniappa Chetty had such authority or that the note was made in his name, but in his examination he admitted that he and his brothers were the partners of the firm represented by Ka. Ru. Chu ; that Palaniappa was their sole agent in Colombo ; and that he was employed to sell goods for him on commission, but not to buy goods on credit, though it was customary for his agents to do so.

After evidence taken and considered, the learned district judge (*Lawson*) found that,—

" By the general custom of chetty merchants living on the coast and trading in Colombo, an agent such as Palaniappa has power to grant pro notes in the name of his principals, and (2) that the usual and proper mode of doing so, according to the customs of such merchants, is by signing the initials of the firm followed by the name of the agent, that chetty firms are as well known and as properly designated by certain initials as the partners in an English firm by the name under which they trade, and that the signature in the present case is to the same effect as if it had been written " Ka. Ru. Chu. by their attorney Palaniappa Chetty." The note therefore being signed by an authorized agent in the name of the firm, no further proof is necessary that it is binding on the members of the firm. Judgment for plaintiff, &c."

On appeal, *Cayley* for appellant contended (in his petition of appeal.)

1.—That the custom referred to was not sufficiently proved.

2.—That if proved, the custom was bad, as enabling agents, without reference to the nature of the transaction in which, or the purposes for which, the notes might be signed, to bind their principal upon the coast, to any extent, however large, by signing negotiable instruments in the names of such principals.

3.—That even if the alleged custom existed, it could only extend to negotiable instruments executed for the purposes of the trade carried on by the agent for his principals, which was not proved in the present case, although expressly denied in the defendant's answer.

Lorenz contra.

1866. Nov. 8.

The following is the judgment of the Supreme Court :—

It was proved in this case to be a well known commercial custom for chetties, like Palaniappa Chetty, when employed by persons on the coast like the defendant, to sign promissory notes for their principals, and to do so by a peculiar form of signature. It seems reasonable to consider that when defendant employed Palaniappa Chetty to act for him, he employed and authorized him to act for him in the customary manner. The form in which the note was signed is proved to be the form in which the chetty would properly sign, when acting for his principal ; and we are of opinion that the judgment should be affirmed.

November 8th.

Present:—Creasy, C. J. Temple, J. and Stewart, J.

P. C. Harrispattoo, No. 8,713.

Maintenance —"chargeable to others."

This case was remanded for further hearing and judgment, in these terms :—

The plaint so far as regards the complainant herself cannot be sustained, she not being the wife of the defendant. But the case is different as respects the latter part of the charge, the defendant being bound to maintain his child whether legitimate or otherwise.

The complainant was entitled to adduce evidence to prove that the defendant was the father of the child, and of its having been left by him without maintenance, so as to become chargeable to, or to require to be supported by others. The mother is not excluded from such persons.

The maintenance which the father of a child is required to afford, will of course be only such as is requisite and suitable, regard being had to the condition in life of the parties, and the age of the child.

See as to the meaning of the term "maintenance," B. and V. p. 107, Galle, P. C. 23,022.

P. C. Galle, No. 58,288 } *Tambo* v. *Valaynappa Chetty.* 1866. Nov. 15.

Ordinance No. 15 of 1862—liability of defendants.

PLAINT.—Suffering waste or stagnant water to remain in the premises, in breach of 1st clause, 6th sec., No. 15 of 1862.

The police magistrate found as follows :—

I consider all the defendants liable in this case—they all live in the same house—each usinga kitchen—from which kitchen all the filth has been allowed to collect. Defendants are guilty and fined £5 each.

On appeal, *Dias* for defendants, the *Queen's Advocate* for complainant (a police constable.)

The Supreme Court affirmed the conviction and sentence, seeing no reason to the contrary.

November 15th.

Present :—CREASY, C. J., TEMPLE, J., and STEWART, J.

C. R. Matale, No. 1,955. } *Punchi Appu* v. *Baba Appu.*

Kandyan law—deed of gift—clause of disinherison.

In this case a Kandyan gifted his lands to his wife. She predeceased him. After their death, her son, by a former marriage, sold the land to plaintiff. The defendant, who was the nephew of the second husband, disputed the deed, on the ground that he, as the natural heir of the donor, was not specially disinherited.

The commissioner held the deed invalid for want of the clause of disinherison.

The Supreme Court set aside the decree of the court below and entered judgment for plaintiff in these terms :—

There was no necessity for the clause of disinherison in the deed in favor of Kalu Menica, she being the wife of Gamarale.

See Armour p. 179, and Perera p 104.

D. C. Kandy. No. 43,779. } *Fernando* v. *Templer.*

Fiscal—neglect to take security from

This was an action against the fiscal for the central province to recover damages to the extent of £184 and interest, arising from the defendant having, in his capacity of fiscal, neglected to take securities from a purchaser in execution. Default having been

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purchaser in execution—default of purchaser—liability of fiscal for damages—R. & O., 2nd Dec. 1839, cl. 13.

made in payment of the second instalment, the property was resold for a smaller sum, to the damage of the plaintiff in £284 &c.

The learned district judge nonsuited the plaintiff, on the ground that he was premature in his action, as the fiscal had instituted a case against the defaulting purchaser for the difference between the two sales, which when recovered by him, could be paid to plaintiff.

On appeal, *Ferdinands* for appellant, *Dias* for respondent.

The Supreme Court set aside the decree and entered judgment for plaintiff for £274 with interest at 9 per cent per annum from 18th February, 1865, until payment in full, and observed,—

The 13th clause of the fiscal's rules of the 2nd December, 1839, clearly lays down that where the purchase money exceeds £400, "full and sufficient security shall be given for the payment of the second instalment, &c." This security the defendant (fiscal) did not take, and has rendered himself liable to the damages the plaintiff has thereby sustained.

D. C. Colombo, No. 42,477.

Practice—motion for postponement—insufficiency of consent of opposite party—adequate grounds for

In this case, the district judge refused to grant a postponement of the case, though defendant's proctor consented thereto. Neither the plaintiff nor his proctor was present when the case was called, whereupon the district judge non-suited plaintiff with costs, in these terms :—

The court had frequently informed proctors that it would in all cases of postponement expect the proctor making such motion to be present, and support it, whether the opposite party consents or not.

On appeal, the Supreme Court affirmed the order as follows :—

The consent of the opposite party was in itself insufficient. It was the duty of the plaintiff or his proctor to have been present and to have laid adequate ground for obtaining a postponement.

D. C. Kandy, No. 43,833. *Blacklaw v. Miller.*

Partnership—purchase by one

This was an action to recover £70 1 1½, balance said to be due by Miller to Mrs. Blacklaw (formerly widow of Findlay) on a bond. Defendant admitting the debt, pleaded that he and Mrs.

Blacklaw were partners in trade, and that he was entitled to commission for purchasing his partner's share of the business. 1866. Nov. 22.

It was proved in evidence that Miller received £500 a year as managing partner (irrespective of his share of the profits,) and was the attorney of his partner who was in England at the time, and that he, as Mrs. Findlay's attorney, purchased her share of the business for himself. This was the transaction on which he claimed commission. Colonel Byrde, who was examined as a witness for the plaintiff, proved that it was not the practice when partners traded together, for one to charge commission on his purchasing the other's share.

partner of the other's share —claim for commission on the sale.

The district judge upheld the claim for commission.

On appeal, *Ferdinands* for appellant, *Dias* for respondent.

The Supreme Court set aside the decree and gave judgment for plaintiff as claimed together with costs, observing,—

Colonel Byrde's evidence (which is uncontradicted by any proof) is explicit as to the usage.

It moreover appears to us that the defendant being himself the purchaser of his partner's share, and being paid for the management of the business, was not under the circumstances of this case, entitled to commission.

November, 22nd.

Present :—Creasy, C. J., Temple, J., and Stewart, J.

D. C. Jaffna, No. 9,310. } *Suppramaniar* v. *Parvady*.

The following is the judgment of the Supreme Court :—

District courts—power of, to reverse its own orders.

The litigation in this case commenced in June, 1857, and has been protracted for nine years, chiefly by a string of motions and cross-motions on points of practice, which are strongly marked by a very reprehensible spirit of chicanery and delay.

This has been greatly encouraged by the custom, which we perceive from this and other cases to have grown up in the Jaffna district court, for the court to entertain motions to reverse its own orders,—such motions being frequently made long after the date of the orders.

Then comes an appeal nominally against the decision of the district court on the motion to reverse, but in reality raising the question disposed of by the old order, and which ought to have

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been brought before the Supreme Court within the time limited for appealing by either party dissatisfied therewith.

This practice is quite irregular. Except to rectify cases of clerical or similarly accidental mistake, the district court has no power to reverse its own orders. That, if it be done at all, is to be done by the Supreme Court in appeal. The power of recommending an appeal notwithstanding the lapse of time fully enables the district judge to provide for the rare cases in which the interests of fair play and substantial justice require that appellants should not be held rigidly to the time prescribed by law for appealing.

The order now appealed against is an order to reverse an old order, and cannot be allowed to stand. But having carefully examined these confused and complicated proceedings, the Supreme Court feels satisfied that the award of August 6th of 1866, was properly made; and that the conduct of this appellant has been most vexatious under these circumstances, and having regard to the fact that those who instead of appealing against the order of the 23rd of August, met it by a counter motion in the district court, were following a practice which had apparently become established in their court, we shall not limit ourselves to merely setting aside the order now appealed against. The effect of such a course would be to leave the award rejected, and to sanction a substantial injustice. The more formal course would be now to give leave to appeal against the order of the 23rd of August, notwithstanding the lapse of time. But that would only cause further delay; and as we have all the materials before us now, we will dispose of the case between these two parties. But the fact of our dealing in this instance with the old proceedings in the case is not to be taken as a precedent, or as in the least degree pledging us to do so when matters are brought thus irregularly before us.

Order set aside, and award made a rule of court. No costs.

November, 27th.

Present:—CREASY, C. J., TEMPLE, J., and STEWART, J.

P. C. Kandy, No. 66235. *Punchy Menika* v. *Saito.*

Maintenance —chargeable to "others."

In this case of maintenance, the order of dismissal was set aside on complainant's appeal, and case remanded to be proceeded with in these terms:—

The word "others" in the Ordinance includes the wife, and means others than the father of the child. 1866. Nov. 27.

See P. C. Galle, No. 47,251, 3rd December, 1863.*

D. C. Badulle, No. 17,113. } *Appu Naide* v. *Appu Naide*, et. al.

Examination of party—admissions—nonsuit thereon—irregularity.

On appeal against the order of nonsuit entered by the district judge, *Lorenz* appeared for appellant.

The Supreme Court remanded the case for hearing, with these observations :—

We do not think it right that a plaintiff should be nonsuited on his adversary's motion, when nothing has taken place beyond the hostile examination of the plaintiff by his adversary's proctor ; and when the plaintiff has had no opportunity of calling his witnesses, or of coming forward as a witness himself. On the examination by his adversary he has no means of explaining answers which may be coaxed or forced out of him, nor has he any opportunity of bringing forward the facts of the case which are in his favour, as well as those which are against him, to which last mentioned class his opponent's questions are exclusively directed.

D. C. Kandy, No. 43,180. } *Templer* v. *Nannytamby*.

Fiscal—sale of land—defaulting purchaser—conditions of sale—action for recovery of penalties thereon—validity of the conditions—Ordinance No. 7 of 1840—R, and O., 11th July 1840.

This was a suit by the fiscal for the central province to recover certain penalties and difference of resale, upon certain conditions of sale. The question was whether such conditions were valid, not having been notarially attested.

In the court below the district judge gave judgment for plaintiff.

On appeal, *Lorenz* for appellant, the *Queen's Advocate* for respondent.

The Supreme Court delivered the following judgment :—

This was an action brought by the fiscal of Kandy against a defaulting purchaser at a fiscal's sale of landed property under a writ of execution.

The conditions of sale had been signed by an agent lawfully authorized by the defendant, but they had not been executed before

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* *Ante*, p, 61.—Ed.

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a notary in the manner pointed by the Ordinance of Frauds, No. 7 of 1840, section 2.

This was the only objection relied upon by the appellant. On the other side we were referred to the Rules and Orders of July 11th, 1840, which by Ordinance No. 8 of 1846 have the same force as an Ordinance. It seems to us that these Rules and the Ordinance No. 7 of 1840 must be read together, as framed nearly at the same time, and as both applying to sales of land. And as the Rules of 1840 prescribe many formalities respecting fiscal's sales, but nowhere require any notarial execution of any documents used in the course of the sale, we think that the effect of the legislation on the subject is that fiscal's sales, and the documents employed therein do not require notarial execution. Such sales are certainly not likely to be attended with the mischiefs and frauds which the Ordinance No. 7 of 1840 intended to prevent; and we think that fiscal's sales may be held to be exempt from it, as sales under a decree of a Court of Equity are held to be within the English Statutes of Frauds.

Affirmed.

D. C. Caltura, No. 20,686. } *Thegis Appu* v. *Goonetilleke.*

Proctor and client—trial of case—presence of defendant's proctor—waiver of trial notice.

In this case, on the day of trial, defendant's proctor was present but defendant was absent. The D. J. proceeded with the case, defendant's proctor taking part in the same.

Judgment was given in favour of plaintiff.

The defendant and appellant appealed on the following grounds:

1.—That no notice of trial had been served either upon him or his proctor.

2.—That though defendant's proctor was present and took part in the case, yet that was in itself insufficient to do away with the special requirements of the Rules and Orders.

Cayley for defendant appellant, *Alwis* for plaintiff, respondent.

The Supreme Court affirmed the decision of the court below.

D. C. Colombo, No. 44,203. } *Thaynappa Chetty* v. *Packier Bawa.*

This was an appeal for costs under the circumstances set forth in the following judgment of the Supreme Court.

Cayley appeared for plaintiff appellant.

Creasy, C. J.—The plaintiff herein on the 21st of July 1866, obtained judgment in the district court of Colombo, for princi pal

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Costs—claim of £10 at the time of filing of libel—claim for further interest—right of plaintiff to sue in district court—jurisdiction of court of requests—test to determine.

and interest due on a promissory note, bearing interest on the face of it at twelve per cent. The amount due on the day of the libel (6th July, 1866) was £10 whereof £8 1 0 was for balance principal and £1 19 0 for balance of interest then due. The libel in the common and regular form claimed further interest till payment in full. The further interest which had accrued during the sixteen days between the date of the libel and the judgment, raised the amount for which the plaintiff got judgment to a sum exceeding £10, to say nothing of the further accrual of interest before execution and satisfaction.

The learned judge of the district court held that the case was within the jurisdiction of the court of requests, and therefore ordered that the plaintiff should have no costs. This order is now appealed against, and as it seems to us to be founded on an error in law, and not to be a mere exercise of the judge's discretionary power, we thing it should be set aside.

The plaintiff in this case clearly had judgment to recover a sum exceeding £10. It is equally clear that in construing Court of Requests' acts and ordinances as to jurisdiction, it is the amount which the plaintiff has judgment to recover that determines whether the action was within the jurisdiction of the inferior court (see *Baddely* v. *Oliver*, 1 C. and M. 219, and many other cases on the subject.) It is equally clear that this plaintiff could not have brought one action in the court of requests for the £10, and a second action in the same court for the extra interest, without splitting his cause of action in a manner prohibited by law. Lastly, it is clear that, however small may have been the extra interest, the plaintiff was not compellable to forego it, and sue so as to get £10 only in the inferior court. If a man cannot get all that is due to him without coming to a superior court, he has a right to come to that court, and is not to be mulcted by loss of costs for so doing. To quote the words used on this subject in *Broom's Legal Maxims*—" The smallness of the damages affords no reason why the plaintiff should lose them,"—(see p. 158, 1st Ed. and cases therein cited.)

Some remarks in this case were made as to part of the sum recovered being for interest, and there was a suggestion that a suit might be entertained in the Court of Requests for the amount of principal due on a note up to £10, and for interest also. But if we recollect what is the nature of interest as recovered on a bill or note, we shall see that this is not the case. Even where the note or bill does not bear interest on the face of it, interest is not in the nature of costs : it is not something merely incidental to the cause of action, and to the process of action, as costs are but it forms part of the cause of action itself. In the words of Mr. Justice Byles

1866. Nov. 29. —" interest is in the nature of damages for the retention of the principal debt," (Byles on Bills, p. 264, 7th edition.) Moreover the same high authority shews that in a case like the present, where interest is made payable on the face of the instrument itself, it is recoverable not merely as damages but as an actual part of the debt.

We do not think the circumstance material that on the actual day of filing the libel only £10 had accrued due. There is no presumption of law or fact that the debtor who had broken his contract, would come forward to pay upon that particular day ; the presumption rather was that he would not pay till forced by process of law ; and the plaintiff rightly claimed, and has rightly recovered, such further interest which raises his cause of action above £10.

November, 29th.

Present :—Creasy, C. J., Temple, J., and Stewart, J.

D. C. Kandy, No. 43,570.

Lorenz for appellant, *Ferdinands* for respondent.

Mortgagee and purchaser—neglect.

We think this decision was right. The neglect of the mortgagee in not ascertaining who was in possession of the land, at least equalled the neglect of the purchaser in not getting possession of the government grant.

See the judgment of Lord Tenderden, C. J., and Patteson, J. in *Harrington* v. *Price*, 3 B. N. A. 170.

D. C. Kandy, No. 42,917. *Velupillay* v. *Murugaser.*

Promissory note—alteration in date—consent of maker.

This was an appeal from a judgment of the acting district judge holding a promissory note to be void, in consequence of an alteration in its date without the consent of the maker. The note was a four months note, made by defendant in favour of one Muttappa Chetty, and given to Ariacutty to be discounted, who altered it into a three months note, affixing the initials of Muttappa Chetty to the alteration, and discounted it out of moneys that plaintiff had left with him for that purpose.

Plaintiff did not account for the alteration.

Cayley for plaintiff appellant, *Ferdinands* for respondent.

The Supreme Court affirmed the decree, observing,—the law on this point is clearly laid down in the note to *Master* v. *Miller*. 1 Smith's Leading Cases, 271.

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December, 3rd.

Present :—Creasy, C. J., Temple, J., and Stewart, J.

D. C. Colombo, No. 512. } *In re* insolvency of *Wilson Ritchie & Co. Gibbs & Sons* of London, appellants.

The *Queen's Advocate*, (with him *Lorenz*) for appellants, *Cayley* for the assignees.

The following is the judgment of the Supreme Court :—

Mortgage of movables not in existence—Ordinance No. 7 of 1840—its object.

It appears to us that the appellants have established their preferential claim over the goods which are now proved to have been in the Hulftsdorp Mills at the time when the bills in question were drawn. We think a sufficient contract of hypothecation was created by the letters of 8th November 1861 and 11th November 1861.

We do not think that the mortgage was invalid, because it was designed to affect things not in existence at the time when it was made. See *Voet, lib*, xx. *tit.* 1. *sec.* 6. If a man can make a valid mortgage of all his future property, he can surely make a valid mortgage of part of his future property. *Voet* says of the kind of property that may be brought under such prospective mortgage—" nec interest mobilia sint an immobilia."

Assuming then that a sufficient mortgage was created, we think that the case in almost all material points is governed by the case of *Andree* v. *Tatham*, reported in Moore's Privy Council Reports, vol. 1. p. 386.

It seems to us that the effect of the deed of inspectorship in this case, and of the proceedings under it before the insolvency, places this case on the same footing as *Andree* v. *Tatham*, both as regards the objection about non-delivery and that respecting the goods having been left in the order and disposition of the insolvent.

The distinction taken between that case and the present is that, in that case, the preferential claimant held a mortgage, regularly executed before a notary, whereas the documents creating the mortgage in the present case are not notarial.

No express authority is quoted in support of this objection. But, it is said, that by the old Roman Dutch law, before the passing of the Ordinance of Frauds, No. 7 of 1840, No. 7 of 1834, and regulation No. 4 of 1817 a mortgage of moveables, signed but not notarial, was valid as between the parties to it, but invalid as

1866. Dec. 3. — to third parties. And, it was said that, the meaning of section 21 of Ordinance No. 7 of 1840, (the Ordinance now in force on the subject) is to make such contracts valid to the same extent only. To hold this, would be to hold that this Ordinance (which does not in any way purport to be declaratory) was in this respect unnecessary and inoperative. We rather agree with the general construction put upon the Ordinance No. 7 of 1840 by the respondents. Its object was to settle the forms of execution necessary to give validity to such coutracts as are not to be made by mere verbal engagement. The Ordinance makes three classes of such contracts. The first class is of *contracts inter vivos* affecting land, which are required to be notarial with two witnesses. The next class is of *testamentary instruments* which are required to be notarial with two witnesses or non-notarial with five witnesses. The third class is of *certain contracts,* including such as the present affecting moveables, are to be signed by the parties, but no notarial execution or attestation is necessary.

It appears that the goods in question have been sold, and that the proceeds are held by the assignees subject to the order of this court, and that the money does not exceed the amount to which the appellants are entitled. It is ordered therefore that the assignees do pay over to the appellants the proceeds of the goods particularized in the list of the 25th October, 1866, which is filed with the proceedings in this case.

D. C. Colombo, No. 38,573. } *C. M. Bank* v. *B. I. S. Navigation Company.*

Shipping—consignee and ship owners—loss of goods over ship's side—ordinary precautions—custom of the port—bill of lading.

The following judgment of the learned district judge sets out the facts of this case :—

"This is an action brought by the Mercantile Bank as shippers and consignees of certain boxes of specie on board one of the steamers of the British Indian Steam Navigation Company, for the value of a box of rupees lost in the sea in the course of transhipment from the steamer to the cargo boat sent by the plaintiffs to receive it. There can be no doubt that the box in question fell from the slings when being lowered into the boat, but the evidence as to the cause of falling is conflicting and unsatisfactory. The bank peon who was on board the vessel to receive the specie swears that it fell out of the slings when hanging over the side, and not in consequence of coming in contract with anything, but solely from having been insecurely slung. The chief officer of the steamer gives evidence

which would prove that the loss was occasioned by the breaking of one of the ropes by which the cargo boat was attached head and stern to the vessel—so that the box may probably have struck against the side of the boat, when being lowered—in the former case the defendants would, in the latter, they would not, have been responsible for the accident which occurred. But the plaintiff has called no evidence but that of the peon who was on board ship at the time, and has not satisfactorily accounted for the absence of the boatmen, who would have given the best account of the actual mode in which the loss occurred. The court, therefore, in the absence of better evidence as to the cause of the accident must nonsuit the plaintiff. The plaintiff has attempted to throw the responsibility of the loss on the defendants in consequence of their not having used net slings, and not having attached buoys to the boxes before discharging them ; but there is no evidence before the court to prove that such precautions were ordinary or necessary, so that the plaintiff's neglect would render the defendants responsible for a loss which could not otherwise have been imputed to them. It is decreed that plaintiff be nonsuited with costs,"

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On appeal, *Lorenz* and *Cayley* for plaintiff appellant ; the *Queen's Advocate* for respondent.

The judgment of the Supreme Court was as follows :—

There is in this case a conflict of evidence, and unless we clearly saw that the decision of the district judge on the question of fact before him was wrong, we should not interfere with his decision. The evidence of one witness had to be taken on commission, but, with that exception, the district judge heard the evidence given, and observed the demeanour of the witnesses, and was better qualified to determine on which side the truth lay, than we can be, who only read the proof as they appear on paper. We agree with him in preferring the evidence of the chief mate to that of the bank peon ; and the plaintiff's omission to call any of the boatmen or the tindal is at least as remarkable as the fact of the defendants' not calling more of the ship's officers.

We take the fact to be that the boat which was sent by the defendants to receive the specie along-side the ship, was defective as to its management and gear, and that the gunwale or some other part of the boat, in consequence of such defect in the management or gear of the boat, struck, in rolling, against the box of specie which had been carefully lowered from the ship's side, and was then ready for safe reception into the plaintiffs' boat by the plaintiffs' people, if the boat had been then and there in proper position and under proper management. If the box was thus struck from the slings, and was lost through the mis-management of the plaintiffs'

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people, after the defendants had carefully and safely placed it over the ship's side, in due place for reception by the boat, we think that the defendants are not liable. The bill of lading expressly stipulates that the goods are to be at the risk of the consignees immediately on passing the steamer's side.

We have been pressed by [the evidence extracted on cross-examination from one of the defendants' witnesses, as to the propriety of using net slings when valuable property like this box of specie is to be delivered over the ship's side. Had full and clear proof been given that it is customary in deliveries along the ship's side, generally, or in such deliveries at this particular port of Colombo, to use net slings for such articles, our judgment would probably be different from that at which we at present have arrived.

If such a mode of delivery is the usual and proper mode, it would have been easy for the plaintiff to give full proof of it in the Colombo district court, by calling ship master's, or merchants, or boatmen, or others whose occupation made them practically acquainted with the fact. The only witness whom the plaintiff examines in chief as to this point is the bank peon, whose evidence we can give no weight to, as we consider him to have given untrue testimony as to the position of the boat, and as to other matters whereon he is contradicted. It is remarkable also that though the plaintiff calls the assistant master attendant of the port to speak to other matters, they do not question him about the usage of net slings —though if such usage was really general and proper he would have been a most competent person to speak of it. We do not consider the statements made by the other side on cross-examination sufficient to establish this part of the plaintiffs' case.

Affirmed.

D. C. Galle, No. 19,9937. *In re* Insolvency of *J. A. Hume.* *Mary Hume* v. *Brodie Bogue & Co.*

Husband and wife—antenuptial contract—separate estate mortgage by husband to wife—preferential claim by independent

The *Queen's Advocate* (with him *Lorenz* and *Cayley,*) for defendants appellant; *Dias* (with him *Ferdinands* and *Alwis*) for plaintiff respondent.

The following is the judgment of the Supreme Court :—

This case arises out of the insolvency of Mr. John Alexander Hume, who lately arrived on business as a merchant at Galle.

His wife (the respondent in this appeal) makes a preferential claim over certain lands, part of the insolvent's estate, by virtue of mortgages over those lands made to her by the insolvent in 1854 and 1858.

Her claim is opposed, not by the assignees, but by a creditor, Mr. Brodie, the present appellants, who put forward a preferential claim over these lands and other property, by virtue of a mortgage subsequent to Mrs. Hume's mortgage. 1866. Dec. 3. — creditor—Ordinance No. 7 of 1840, cl. 2.

Mr. and Mrs. Hume were both Scotch, and they were married in Scotland in 1852.

Mr. Hume had resided and traded in this island before the marriage, and he returned here after the marriage, bringing his wife with him.

There was an ante-nuptial contract executed in Scotland, which, as to its terms, was sufficient, both according to Scotch law and according to Roman Dutch law, to exclude communion of property between husband and wife.

After Mr. Hume's return to Ceylon with his wife, Mrs. Hume received from her family considerable sums of money as her separate property, and she sent the greater part of these monies to her husband. It was as securities for these loans that the mortgages, in question was made. These were made respectively after the loans for which they were intended to be securities.

The reality and *bonâ fides* of these loans are not disputed. It it admitted that Mrs. Hume might prove for them as a general creditor, but Mr. Brodie disputes her special right by virtue of the mortgages.

It is to be observed that Mr. Hume, the insolvent, acted with perfect faith and fairness towards all parties in these transactions. We give full credit to Mr. Hume's statement, "I had no prospect of failing when Mrs. Hume left Ceylon," a date after the last mortgage to Mrs. Hume, and prior to the mortgage of Mr. Brodie.

Letters which have been produced shew clearly that Mr. Hume, before he executed the subsequent mortgage to Mr. Brodie, gave Mr. Brodie express notice of the prior mortgages to Mrs. Hume; and that though the title deeds of the lands were sent to Mr. Brodie for his legal advisers to examine before the mortgage to Mr. Brodie was completed, these title deeds were returned by Mr. Brodie to Mr. Hume, to be held in behalf of Mrs. Hume as first mortgagee.

Under these circumstances we cannot allow the objection to prevail, which Mr. Brodie now makes to Mr. Hume's mortgages as void for want of consideration.

But Mr. Brodie's main objection is of a different nature, and arises out of one of our Ordinances, the material clause of which we will quote in full. The Ordinance No. 7 of 1840, (commonly called the Ordinance of Frauds) enacts by its second section,—

"2.—And it is further enacted that no sale, purchase, trans-
" fer, assignment or mortgage of land or other immoveable property

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"and no promise, bargain, contract or agreement for affecting any "such object, or for establishing any security interest or incumb- "rance affecting land or other immoveableproperty, (other than "a lease at will, or for any period not exceeding one month,) nor "any contract or agreement for the future sale or purchase of any "land or other immoveable property, shall be of force or avail in "law, unless the same shall be in writing and signed by the party "making the same or by some person lawfully authorized by him "or her in the presence of a licensed notary public and two or "more witnesses present at the same time, and unless the execu- "tion of such writing deed or instrument be duly attested by such "notary and witnesses."

The mortgages by Mr. Hume to Mrs. Hume, on which Mrs. Hume now claims, were duly executed here according to the provisions of this Ordinance for "establishing any interest in land," and that Mr. Hume's ante-nuptial contract is a nullity, so far as regards lands situate in Ceylon.

As we have before pointed out, the mortgages on which Mrs. Hume claims are executed according to the Ordinance. The argument of the appellant must go the length of maintaining that no contract of marriage, either with an ante-nuptial contract or without one, can confer the "status" necessary for the acquisition of interest in lands here, unless such contract be executed before a notary and attested by the notary and two witnesses. And this must apply not only to the wife but to the children of the marriage, and to all who declare title through such children as lawful heirs.

The consequences of establishing such a doctrine would be very formidable. But we need not pronounce a positive opinion on it in this case; because, in this case, if admitted, it proves too much for the appellant, and is in truth a suicidal objection. If as regards lands in Ceylon, contracts are void, which are not executed according to our Ordinance of Frauds, then the marriage contract itself between Mr. and Mrs. Hume is void as regards lands in this island. For they were married in Scotland. and according to Scotch law ; and it is not pretended that any notarial contract of marriage between them, or any marriage contract at all, was ever executed in Ceylon. It would follow that when Mrs. Hume took these mortgages she was by the law of Ceylon a *feme sole* as to landed property, and capable of taking an interest in her own right as mortgagee from Mrs. Hume, if the mortgage deeds were properly executed according to our Ordinances, and these mortgages were certainly so executed.

This is the conclusion to which the argument for the appellants must lead. We do not express any decision as to the validity of that argument. It is enough to see that if valid, it destroys the appellant's case.

December, 14th.

1866. Dec. 14.

Present :—TEMPLE, J., and STEWART, J.

P. C. Colombo, No. 93,700. } *Jordain* v. *Park*.

Plaint—desertion—British ship—jurisdiction.

Cayley for defendant appellant.

The following is the judgment of the Supreme Court :—

The complaint is for desertion from the ship "Caldera." This plaint is substantially defective for not stating the "Caldera" to be a "British ship trading to Colombo," so as to bring the defendant within the jurisdiction of the police court. As the case now stands the "Caldera" may be an American ship for all the court knows. In case No. 17,327, P. C. Matella, *Beling's* Rep., p. 128, it was held that the jurisdiction of inferior courts must appear on the face of the plaint, and if such jurisdiction be doubtful no intendment can be made in its favour. Against this it has been suggested that § 25 of the police court Ordinance may have some effect, but that clause is copied from § 11 of No. 7 of 1854, and the date of the decision is July, 1855 ; so that, that decision was given after the substance of the said § 25 was laid in Ceylon.

C. R. Kaigalle, No. 1,222. } *Hattu Ettana* v. *Malhami*.

Kandyan law—deega marriage—inheritance brothers and sisters of the half-blood.

The land in dispute belonged to one Lakama deceased. The defendant was his issue by the first bed,—the first and second plaintiffs by the second bed,—the third plaintiff (mother of first and second) was the surviving widow. The plaintiffs now sought to recover an undivided half of the disputed land. Defendant, admitting the above facts, denied plaintiffs' right to any share of the deceased's lands, inasmuch as the first and second plaintiffs (daughters) were both married out in deega, one during the father's lifetime, and the other after his death, and the widow had left her husband's house not being in want.

The commissioner nonsuited plaintiffs.

On appeal, *Ferdinands* appeared for plaintiffs appellants.

The Supreme Court set aside the order and entered judgment for plaintiffs, as follows :—

In this case an ancestor died leaving three sons by a first wife, a second wife as a widow, and two daughters by the latter married out in deega. The court below nonsuited the three last parties who claim, with the sons, shares in the ancestral property, as plaintiffs. The relationship is admitted. Daughters of the half blood do not

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forfeit by any deega marriage their right to inherit their parent's estate in favor of their brothers and sisters of the half blood. D. C. Kandy, No. 17,509, *Collective Minutes*, June 24, 1843, *Austin* 88.

C. R. Pantura, No. 5,647. } *Pieris* v. *Baba Nona.*

Sale—tree standing on land—Ordinance No. 7 of 1840.

On appeal by defendant, *Lorenz* appeared for her.

The Supreme Court nonsuited plaintiff in these terms :—

This case is a dispute about a tree sold when standing. Standing timber is in the eye of the law the same as land, and the plaintiff could not recover except under a deed of sale.

December, 21st.

Present :—Temple, J., and Thomson, J.

D. C. Ratnapoora, No. 8,613. } *Appuhamy* v. *Mudilihamy.*

Marriage—presents in contemplation of—refusal to marry—claim for restitution of such presents.

This was an action to recover certain jewels and presents, or their value, given by plaintiff to defendant, in contemplation of a marriage, which the defendant refused to carry out. The district judge nonsuited the plaintiff with costs on the ground that "there "was nothing to shew that any agreement for restitution was made "with plaintiff, in the event of the marriage not taking place, and "the trinkets can only be looked upon as a gift resulting from, "perhaps, misplaced affection."

Ferdinands for appellant, *Lorenz* for respondent.

The Supreme Court set aside the order of nonsuit and entered judgment for plaintiff in these terms :—

It is clear that a marriage having been arranged between the plaintiff and the third defendant, with the consent of her parents the first and second defendants, the plaintiff went and presented the third defendant with certain jewels according to the custom of the country ; the third defendant now refuses to marry the plaintiff, and has married another man. The plaintiff therefore has a right to recover back the jewels or their value, which has been proved to be £14. See *Grotius*, p. 288.

1867.

January 12th.

Present :—CREASY, C. J., and TEMPLE, J.

The Hon'ble Charles Henry Stewart produces in court a warrant under the hand and Colonial Seal of His Excellency Sir Hercules George Robert Robinson, Knight, Governor and Commander-in-Chief of the Island of Ceylon, bearing date the 11th day of January 1867, appointing him the said Charles Henry Stewart Acting Puisne Justice of the Supreme Court of the Island of Ceylon. The said warrant is read and filed. Mr. Stewart sworn in as acting Puisne Justice.

The said Charles Henry Stewart thereupon takes the oaths of office and allegiance in such manner and form as the same are by law appointed to be taken or made in Great Britain, which oaths were administered by the Hon'ble the Chief Justice.

Richard Cayley, Esquire, produces in court a warrant under the hand and Colonial Seal of His Excellency Sir Hercules George Robert Robinson, Knight, Governor and Commander-in-Chief of the Island of Ceylon bearing date the 11th January 1867, appointing him Acting Deputy Queen's Advocate for the Island of Ceylon. The said warrant is read and filed, and the said Richard Cayley thereupon takes the oaths of office and allegiance. Mr. Cayley as acting D. Q. A.

P. C. Chavagacherri, No. 7,080. *Valliammai v. Vettivelu.*

The following is the judgment of the Supreme Court :— Contempt of court—party failing to be ready with witnesses—observations of magistrate.

The police magistrate was quite right under the circumstances in not allowing a postponement of the case, but the appellant's omission to be ready with her witnesses was not punishable as contempt of court.

The Supreme Court observes with regret the last sentence of the police magistrate's judgment which states that "the court cannot submit to such gross insolence *from any native.*"

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Such language by no means proves conclusively that natives receive different treatment in the court from that which would be received by Europeans, but the use of such language from the bench has a strong tendency to create suspicions that such is the case, and the impartial administration of justice towards persons of every race and of every class ought not to be thus exposed to suspicion.

February 2nd.

Present :—TEMPLE, J.

P. C. Gampola, No. 16,699.

Ordinance No. 10 of 1844. cl. 29 —forfeiture.

PLAINT :—That the defendant did, on the 12th day of January, 1867, retail brandy and gin for the purpose of being consumed on the premises within which the same was sold, without having first obtained a license for that purpose from the government agent, contrary to the provisions of clause 29 of the Ordinance No. 10 of 1844.

The magistrate found the prisoner guilty, and fined him £5, and ordered the spirits seized to be forfeited.

The Supreme Court affirmed the order as to the fine imposed, but set it aside as to the forfeiture of the spirits. The 29th clause of Ordinance No. 10 of 1844, does not authorize such forfeiture.

March 8th.

Present :—STEWART, J.

C. R. Gampola, No. 21,658. *Thwaites* v. *Ryan.*

Medical practitioner —claim for fees—bye-law of the College of Physicians.

The plaintiff who was a duly qualified doctor sued the defendant for £6, due as fees for medical attendance and advice given from 23rd March to 4th April, 1866.

The defendant pleaded never indebted, and claimed in reconvention £10 as damages arising from plaintiff injuring a weighing machine of the defendant's.

On the trial day, plaintiff admitted that he was a member of the College of Physicians, and that a bye-law of that institution prohibited its members from recovering fees.

Thereupon the commissioner allowed the motion of the defendant to amend his answer by pleading disability of the plaintiff to recover, and dismissed plaintiff's case with costs.

On appeal, the decree of the court below was set aside and judgment entered for plaintiff without prejudice to the defendant proceeding afresh for the value of the weighing machine, if so advised. The Supreme Court observed,—

The plaintiff is not precluded from recovering for his attendance as a medical man. See *Hupe* v. *Phelps*, 2 Starkie, 482.

March 22nd.

Present:—STEWART, J.

1867. April 18.

P. C. Panwilla, No. 8,644.

Dias for appellant.

Labor Ordinance—carpenter—contract to saw timber.

In this case the defendants were charged with leaving complainant's service without notice &c., in breach of the 11th clause, of the Ordinance No. 11 of 1865.

It transpired in evidence that defendants contracted to split shingles and saw timber for complainant at a certain rate, which they failed to do, and that they were residents on complainant's estate, and were supported by him at the time.

The police magistrate convicted the accused as coming within the Labor Ordinance.

On appeal the conviction and sentence were set aside "as the defendants cannot be regarded as in the service of the complainants, within the meaning of the 11th section of the Ordinance No. 11 of 1865, so as to render them criminally liable. The holding of the Supreme Court in P. C. Matura 24,684 applies, *Joseph* and *Beven* p. 47."

April 18th.

Present:—STEWART, J.

C. R. Colombo, No. 48,507. *Mohamado Tamby* v. *Swan.*

Proctor and client—failure to conduct case—refund of fees.

In this case plaintiff sued for £1, money advanced by plaintiff to defendant, a proctor, to conduct a case in the district court of Colombo, which defendant failed to do. Defendant in his answer admitted the receipt of £1, and that plaintiff promised him £2 to conduct the case in question; that defendant paid £1, promising to pay the balance £1, before the day of trial, which he failed to do. Defendant was ready to proceed with the case, and had done work for £1, yet plaintiff failed to pay him the balance

The commissioner nonsuited plaintiff, observing,—

Under the circumstances the court does not think that the defendant should be required to refund what he has received. I believe him.

On appeal, affirmed.

1867. April 25.

C. R. Colombo, No. 48,979.

Practice—deposit in court admitted in pleadings—meaning of bringing money into court.

The Supreme Court observed in this case,—

It must be remarked that it is not the practice in the Colombo court of requests to deposit the money admitted in court. It is usual only to *tender* the money with the answer, and if the plaintiff does not accept the amount tendered, the chief clerk allows defendant's proctor to keep the money. This practice is doubtless reprehensible and ought to be at once altered for the practice prevailing in the district court. To bring money into court, is to make it available to be drawn by the opposite party at any time ; it is obvious that this cannot be done if the money is to be only nominally "brought into court" by a stereotyped phrase in the pleadings, while the proctor has the use of it all along.

April 25th.

Present :—STEWART, J.

D. C. Kurnegalle, No. 1,437. *Dingiri Appu* v. *Moregame Unanse.*

Arbitrator appointed by court—award signed without knowledge of contents—fraud—contempt of court.

The facts of this case as stated by the district judge are these:

"The aratchy was appointed an arbitrator in the district court case to decide with two others, whether certain lands claimed by the parties to this case, were in one village or another. An award was filed and duly sworn by him, stating that the lands were in one village. Afterwards the award was impugned on the ground of fraud, and the aratchy,(who would not appear until brought up under warrant of attachment) whilst admitting his signature, made after oath administered, says and swears he did not know the contents of the document he signed. He can read and write well, and the court believes he well knew the contents of the award, and that he perjures himself in saying he did not. But as he persists he did not, the court has now to adopt his admission, and on it charges him with contempt of court, in having signed and sworn to the contents of a document, before the court, without ascertaining what were the contents—he then being engaged in discharging a sacred duty especially entrusted to him by the court.

The accused pleaded guilty.

On appeal against the conviction and sentence of £20 fine, the Supreme Court affirmed the order.

June, 4th.

1867. June 11.

Present :—Creasy, C. J., Temple, J., and Stewart, J.

D. C. Galle, No. 24,482. } *Bawa* v. *Kunji Lebbe.*

Fiscal's sale—forfeiture of one-fourth proceeds—contest between judgment creditor and mortgagee—right of mortgagee.

The plaintiff obtained judgment against defendant for £341 13 3, and sued out a writ of execution against his property ; certain lands were seized and sold for £364 19 6. According to the conditions of sale the purchaser paid one-fourth of the purchase money, but failed to pay the balance. The deposit was accordingly forfeited. The property was resold, and the mortgagee, Ibrahim Saibo, claimed the proceeds. The plaintiff thereupon issued a notice on the claimant why the one-fourth proceeds forfeited should not be paid to the plaintiff, at whose instance the writ was issued. The court below gave preference to the mortgagee (claimant).

The plaintiff appealed. *Dias* appeared for him.

The Supreme Court upheld the order of the court below in these terms :—

The Supreme Court thinks that this money is to be regarded, as part of the proceeds of the sale of the land, over which proceeds, as over the land, the mortgagee had a preferential claim.

June, 11th.

Present:—Creasy, C. J. Temple, J. and Stewart, J.

D. C. Colombo, No. 3,192. } *Soyza* v. *Ameresekara.*

Administration—stale application for.

The *Queen's Advocate* with *Lorenz* for Ameresekara appellant, *Cayley* and *Thwaites*, for the respondent.

The Supreme Court in disallowing the application of Soyza for letters of administration, observed,—

The Supreme Court has in former cases referred to the rule followed in the English Ecclesiastical Courts respecting the time within which application ought to be made for probate or letters of administration. That period is five years. An applicant who comes at a later date must satisfactorily account for his delay. See *Williams'* on Executors, vol. 1, pp. 292 and 393. This court has

1867. June 25. recommended, and again recommends that rule for general adoption here.

In the case before this court, there had been a delay for years, and no reasons for the delay were shewn. The application should have been refused.

P. C. Gallegedere, No. 9,883. } *Dingiri Menika* v. *Kolenda Lebbe.*

Practice—necessity of summons.

This was a case under the Malicious Injuries' Ordinance No. 6 of 1846, clause 17. The defendant had received a summons, to answer for damages in a civil suit instituted by the complainant in the court of requests of Galagedera. He went to the court to file his answer, and then and there was called upon to stand his trial upon the charge under the abovementioned Ordinance. This was the first intimation he had received of the criminal charge, which it appeared by the record had been instituted six weeks before. Evidence for the prosecution was heard. Defendant pleaded "not guilty", thinking (as he alleged) he was pleading to the civil suit. He was found guilty upon the evidence adduced, and sentenced to one month's imprisonment at hard labour.

On appeal, the conviction and sentence were set aside, in the following judgment :—

Case remanded for further hearing and judgment. The summons in the civil case was returnable on the same day as the day on which the present case was tried. It would appear that no summons was served on the defendant in the criminal case, but only in the civil. It is not improbable therefore that the defendant as he alleges was unaware, (he being unrepresented by counsel) that the criminal charge was proceeded with.

June, 25th.

D. C. Ratnapura, No. 2. } *In re* insolvency of *Bastian Appu.*

Insolvency—withdrawal of protection—notice.

In this case, at a meeting of creditors there were claims proved, and a complaint was made by one of the assignees that the insolvent would not give in a list of his property. On the complaint made by the assignee, the insolvent's protection was withdrawn. The insolvent happened to be present in court, but not by notice of the meeting.

On appeal, *Cayley* for appellant, *Lorenz* for respondent. 1867. June 25.

The Supreme Court set aside the order, on these terms :—

It does not appear that the insolvent had sufficient, if any, opportunity of rebutting the charge made against him by the assignee on notice that application would be made to the court for the withdrawal of the protection from arrest. If the assignees required the attendance of the insolvent, the assignee should proceed as prescribed by the 31st clause of the Insolvent Ordinance.

D. C. Colombo, No. 44,739. } *Meldrum* v. *Cargill & Co.*

Shipping—master and consignee—freight—abatement, of—loss over ship's side.

This was an action by the master of the ship "Swansley." The learned district judge disallowed two items in the defendant's account with the plaintiff, viz., £25 16 5, for ten cwts. of coal short delivered, and £19 4, value of certain kegs of butter and barrels of flour lost or damaged in discharging cargo. In respect of the coal the district court held that the plaintiff was protected by the usual provision in the bill of lading "weight unknown;" and in respect of the lost or damaged goods the following was the finding by the court below :—

"It appears that in lowering these goods from the vessel into the cargo boat alongside, several packages were thrown out of the sling into the sea, and some lost and others damaged, and that the accident occurred in consequence of the goods being thrown out of the sling by striking against the side of the cargo boat. There is no proof of any negligence on the part of the men employed in this duty, and the loss appears to the court to have been purely the result of accident. There is no proof of any negligence on the part of the men employed in this duty, and the loss appears to the court to have been purely the result of accident. It is an accident of very frequent occurrence in discharging cargo at Colombo, and many cases precisely similar have occurred before, and in all of these the court has held, that when due care has been used the captain of a ship is not responsible for an accident happening as the present accident has above."

Defendants appealed. *Ferdinands* appeared for them. *Cayley* for respondent.

The following is the judgment of the Supreme Court :—

In this case the Supreme Court agrees with the district court in disallowing the abatement claimed in consequence of the alleged

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short delivery of the coals; but it differs from the learned district judge as to the goods lost or damaged in discharging cargo. It seems to us that this loss was not caused by any of the exceptional causes, mentioned in the bill of lading, and that it was not caused by any misconduct or negligence of the owner of the goods or persons in his employ. It is in this last mentioned particular that it differs essentially from another case recently before this court where goods had been lost while being discharged.

In the case now before us, the plaintiff, as a common carrier, was bound to deliver the goods safely unless the loss was caused by any of the exceptional causes expressly mentioned in the bill of lading. To say that they were lost by accident is no answer.

Affirmed, but amount beyond the sum paid into court for which payment is to be entered up is reduced to £21 10 5 by deducting the value of the goods lost overboard. The parties are agreed to these figures.

C. R. Colombo, No. 39,971. } *Coore Hamme* v. *Botego.*

Servitude—neighbouring land owners—overhanging tree—tree owner and land owner—prescription.

The following is the judgment of the Supreme Court:—

This is a case of considerable difficulty and importance, in which the defendant, who is owner of a house and ground in Hulfsdorp street, in Colombo, asserts that the adjacent house and ground of the plaintiff are under a servitude to his, the defendant's, house and ground, which servitude consists in the defendant, as such owner as aforesaid, having a right that a tree belonging to him, and rooted in his, the defendant's, ground, should overhang the house and ground of the plaintiff.

The plaintiff has brought this suit claiming an order for the cutting down so much of the tree as overhangs and inclines towards his premises. The defendant pleads that the plaintiff's right to have any portion of the tree cut down has been lost by prescription

The facts are to be gathered from a survey filed in the case, and from the defendant's examination, on which the plaintiff rested his case. Where the survey differs from the examination, I follow the survey, considering it to be the most trustworthy.

The tree in question is a bread fruit tree planted in defendant's ground close to the boundary. The stem inclines towards the plaintiff's house, and part of the trunk overhangs the plaintiff's ground. At the time of the action being brought, some large branches overhung the plaintiff's house.

The defendant became owner of his ground and of the tree more than twenty years ago. 1867. June 25.

The tree was then rooted in defendant's ground as it now is; its inclination of growth was the same as now; and it has been partly overhanging the plaintiff's ground for more than twenty years. But it has been a growing tree.

When the defendant became owner of his ground and of this tree, there was a boundary wall between the two properties; and at the spot where the tree began to overhang the plaintiff's ground, the wall was built with a curve so as to allow the stem of the tree to lean towards and over the plaintiff's premises. That wall fell down about 16 years ago, since which time there has been only a bamboo fence, until lately, when the plaintiff has begun to erect a new boundary wall, which, at the spot where the tree overhangs, could not be carried up to more than two feet high, unless it was curved as the old curve was, for the express purpose of allowing the tree to slope within and over it. Plaintiff refuses to curve the new wall, and insists on his right to carry the wall up straight, and to have the overhanging part of the tree cut down.

It appears that, until this recent dispute on the occasion of the building of the new boundary wall, the defendant never met wtih any objection on the part of the plaintiff, or those who preceded the plaintiff in the occupation of the plaintiff's premises as to the trunk overhanging those premises, but it also appears that the occupiers of the plaintiff's premises did require the defendant from time to time to lop the branches that began to overhang plaintiff's premises, and that the defendant used to lop such branches accordingly.

The court of requests has given judgment in favor of defendant, holding that he has a right to enjoy the tree as it stands, plaintiff having lost the right to have it cut down by acquiescing in defendant's possession of the servitude for more than ten years.

To some extent this judgment must clearly be modified. The defendant admits that he was always bound to keep the tree lopped and topped, so that the branches should not overhang; and the survey shows that there were overhanging branches at the time of action brought, but a judgment merely directing the cutting of the branches would not determine the main dispute between these parties. The plaintiff wants to have the overhanging part of the trunk lopped down. The defendant says that the plaintiff's land is under a servitude, which binds it to let the trunk overhang, as it has been overhanging for the last ten years, and this is really the difficult part of the case to decide. When I call to mind the many thousand instances in which one mau's cocoanut trees or other valuable trees in this island overhang a neighbour's ground, and when I can

1867. June 25. find no express law or decision of our courts on the subject, I feel the need of extreme care in giving a judgment, which, unless cautiously worded, might become a precedent and incentive for much neigbourly strife, and for much mischievous litigation. I am about to decide this case mainly on its own special circumstances; but, in order to enable me to do even that, it has been necessary to investigate with great pains the Roman and the Roman Dutch law as to servitudes, and the same laws as to trees.

The defendant, (whom we will henceforth call the tree owner,) bases his claim to this easement over the premises of plaintiff, (whom we will henceforth call the land owner) on the prescriptive Ordinance No. 8 of 1834, which enacts by its second section, as follows :—

"And it is further enacted that from and after the first day of July next, proof of the undisturbed and uninterrupted possession of a defendant in any action, or by those under whom he claims, of lands or immoveable property, by a title adverse to or independent of that of the claimant or plaintiff in such action, (that is to say, a possession unaccompanied by payment of rent or produce or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred,) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner when any plaintiff shall bring his action, or any other third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immoveable property, to prevent encroachment or usurpation thereof, or to recover damages for such encroachment or usurpation, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession, as herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favor with costs. Provided always, that the said term of prescription of ten years shall only begin to run against parties claiming estates in remainder or reversion, from the time when the parties so claiming acquired a right to the land in dispute."

There is no doubt that a right to such a servitude, as the servitude claimed in this case, is immoveable property within the meaning of this section. It had been decided by the Privy Council in *Steele* v. *Thompson*, 13 Moore 280, a case from British Guiana, where, as here the Roman Dutch laws prevails. My first inclination was to regard this as an extremely clear clase in favor of defendant; but doubts began to grow and multiply on observing that neither Grotius, nor Voet, nor Van Leeuwen, nor the other text

writers on the Roman Dutch law mentioned among their lists of servitudes, the right of one man's tree to overhang another man's ground. And the more I have investigated the subject in the Roman law itself, the more cause there has appeared for thinking that the relative rights of neighbours as to trees planted near the boundary, formed a special subject of Roman law, long before the doctrine of servitudes was introduced into that law; and that it continued to be a special subject, to which the doctrines of the law of servitudes, if applied at all, must be applied with very great caution.

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Voet (lib: viii, tit: iv, sect. 3.) states clearly that the doctrine of prescriptive servitudes was unknown in the primitive times of the Roman law. He says—"Antiquissimis quidem temporibus nullam urbanarum aut rusticarum servitutum usucapionem admissam fuisse constat."

But the very laws of the Twelve Tables enacted that if a neighbour's tree hung over into another person's land, the land owner might trim it down to fifteen feet from the ground. It has been truly said that this was a limitation of the rights of the land owner, not of the tree owner. Under that enactment the tree owner acquired the right for his tree to overhang the adjoining land owner's ground, so that the overhanging part of the tree did not exceed the height of fifteen feet. This ancient law of the Twelve Tables was in full operation in Justinian's time in cases where the property overhung by the tree was mere land. The land owner might still lop the overhanging tree down to fifteen feet from the ground, but no lower. But where one man's tree overhung another man's house, the householder was permitted by the later prætorian legislation to cut the tree short off to the ground. See the title "*de arboribus cædendis*" in the Digest, lib. x. b. iii. tit. xxvi. The different opinions of great Jurists at different times, as to how much of a tree might be cut down, are cited in the Digest. It makes special mention of what may be done when a tree has been permanently bent over a neighbour's premises by a storm of wind. In the next title of the same book "*de glande legenda*," the Digest is minute as to the right of parties to the fruits of overhanging trees. In book xlvii. tit. vii. "*arborum furtim cæsarum*," the Digest treats of the proceedings against those who wilfully injure another's trees. Many curious distinctions of right are there pointed out especially in the case where one man's tree drives its roots into another man's ground. But, so far as I have been able to ascertain, the imperial legislation of Rome is wholly silent as to any right being acquired by the tree-owner, to have his tree left overhanging his neighbour's premises in consequence of his neighbour having allowed it to do so for any length of time.

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Now, the doctrine of prescriptive servitudes, though not part of the very earliest Roman law like the law as to lopping overhanging trees, had become a part, and an important part, of the Roman law very long before the time of Justinian. The eighth book of the Digest is taken up with the law of servitudes. So is title 3 of the second book of the Institutes. A great number of servitudes which the law would recognize as created by prescription are there discussed. Among them is the *servitus projiciendi*, the right of adding something to a man's building which shall project so as to overhang his neighbour's ground. This and many others are discussed copiously at well as subtly. But, so far as I can find, there is no mention of or allusion to the existence of a servitude as to overhanging trees. It is difficult to suppose that a right, which would have been of so much practical importance, would not have been mentioned if such right had existed. Moreover, though the Roman law as to servitudes says nothing about the right to a servitude being gained in respect of overhanging trees, it mentions trees incidentally when it speaks of servitudes as to lights: and it mentions trees in such a way as leads to the idea that the *jus imminentis arboris* would have no place in Roman law, so far as prescriptive rights are concerned. In the 8th book of the Digest, title 2, section vi; in speaking of the mode in which servitudes can be lost, it is said that the right to unobstructed lights can be taken away, if the owner of the servient tenement is allowed to raise a wall, so as to obstruct such lights, and if the so raised wall is permitted to continue in that state for the appointed time of prescription. By that process the owner of the formerly servient tenement acquired a prescription liberation. Now, the next paragraph of the Digest states, "Quod autem œdificio meo me posse consequi ut libertatem usucaperem, dicitur, idem me non consecuturum, si arborem eodem loco sitam habuissem, Mutius ait; et recte, quia non ita in suo statu et loco maneret arbor quemadmodum paries, propter motum naturalem arboris." The expression "motus naturalis arboris," is explained in the margin of the Corpus Juris Civilis edited by Van Leeuwen, as the natural growth of the tree and of its foliage. The passage certainly implies that the Roman Jurists drew a distinction between gaining a prescriptive right in consequence of the position of an unmoving and unvarying substance, such as a wall or an impending beam, and the gaining such a right in respect of the position of a substance such as a tree, which is very varying in position and bulk; and as to which it therefore cannot be alleged, as of an impending beam, that the land-owner had throughout the appointed term of years sufferred it to overhang his ground exactly in the same manner and to the same extent as when the action was brought.

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The Roman Dutch law commentators on these laws do not, so far as I can discover, in any way intimate that any modern or local law of Holland gave a prescriptive right for an overhanging tree. Voet and Groenwegen, when they comment on the title *"de arboribus cædendis,"* point out that the Roman law which permitted a house-holder, (though not a mere land-owner,) to cut down to the ground an overhanging tree, was so far modified in Holland, that it was there permissible only to cut down the overhanging portion of the tree. They say nothing, and so far as I can find, there is nothing said by any Roman Dutch text-writer as to lapse of time saving the whole tree.

It seems to me therefore that the legal existence of such a servitude, as is claimed for the defendant in this case, is to say the least of it, extremely doubtful. But even if I were quite certain as to its non-existence I should not, therefore, feel justified in finding for the plaintiff to the full extent of his claim. It is quite certain that besides the servitudes enumerated iu the Roman and Roman Dutch law books, others might be originated by the will of the parties, if they were similar in nature to the old ones. Voet says, (lib. viii. tit. 3, sec. 12), " Porro non dubium quin hisce jam enumeratis servitutibus novæ aliæ ex voto contrahentium natura in iis inveniatur." Now, in the present case, I think that the evidence as to the curve in the old wall gives clear proof of an express agreement between the owners of the properties that the defendant's tree should grow, and should continue growing, out of the defendant's ground over the premises which are now the plaintiff's, but that the defendant should keep the boughs lodped so as not to overhang the plaintiff's house. I think such an agreement is sufficiently of the nature of the old servitudes as to be recognizable as a servitude, when once created by legal means. The express agreement for it in this case is not evidenced by any proper notarial document, and therefore would not of itself pass any legal right. But the defendant has under that agreement exercised his right to this servitude, " nec vi, nec clam, nec precario," for more than ten years, and thereby has gained a legal title to it.

In conclusion I wish to observe that, though I have no doubt about this decision meeting the merits of the present case, many of the subjects, which I have been obliged to deal with in considering it, are both difficult and doubtful ; and this judgment is purposely given as the decision of a single judge, in order that the general question as to the relative rights of tree-owners and land-owners may come on, if necessary, hereafter, as perfectly open questions before a collective court.

Judgment to be entered that plaintiff be entitled to require the defendant to cut down from time to time, any branches of the

1867. July 2. — tree that may overhang the plaintiff's house or land ; and that, if the defendant refuse or omit to do so, the plaintiff may himself cut down any such branches, but that the plaintiff is not entitled to cut down any part of the trunk of the said tree. Each party to pay his own costs.

June 26th.

Present :—TEMPLE, J.

C. R. Ratnapoora, No. 4,315.

Agreement—adult and minor—validity.

This was an action on a covenant signed by an adult and a minor.

The commissioner dismissed plantiff's case, in these terms:—

" The agreement is invalid on account of the second defendant being in infancy, and being bad in part, it is bad as a whole."

On appeal, the order was set aside and case remanded for hearing against the first defendant, the Supreme Court observing,—

The fact of the second defendant who signed the receipt, being a minor, does not prevent the plaintiff from recovering upon it against first defendant.

July 2nd.

Present :—CREASY, C. J., TEMPLE, J., and STEWART, J.

D. C. Galle, No. 23,466. *Aysa Oemma* v. *Sago Abdul Lebbe.*

The libel in this case ran as follows :—

Jurisdiction—damages for failure to assist at a burial—matters purely ecclesiastical.

That the plaintiff is a Mohametan professing the Mohametan faith. That the defendant having been duly elected the priest or mahallem of the Mohametans for Galodiadde and Dangedere has been officiating and acting as such for a number of years. That as such priest it is the duty of the defendant to attend the funeral of the mohametan inhabitants of Galopiadde and Dangedere, and to perform the usual and necessary rites and services before and after the burial of such mohametans, when informed. That on

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the 21st day of May instant, the plaintiff gave notice to the defendant of the death of her infant daughter named Ishera, and requested the defendant as is his duty to attend and perform the usual rites and services necessary for the burial of the said deceased child, but that the said defendant, without any reasonable or justifiable cause, but with a view to subject the plaintiff to public odium and disgrace, and otherwise to harass and injure her, refused to attend and perform his customary duties and service at the funeral of the plaintiff's child, to the plaintiff's damage of £50.

Wherefore the plaintiff prays that the defendant may be cited to shew cause why he should not be decreed to pay to plaintiff the said sum of £50 as damages, and the plaintiff also prays for costs and such other relief as to the court may seem meet.

Among other pleas, the defendant pleaded that the court had no jurisdiction to entertain the suit as it involved a question of religious custom among the Moors.

Plaintiff obtained a verdict in her favour in the court below.

Defendant appealed. *Dias* appeared for him.

The Supreme Court set aside the decree and nonsuited plaintiff in the following judgment :—

In this case the plaintiff, a mahomedan woman, sues the defendant, a mahomedan priest, for the recovery of damages, on the ground that the defendant failed, though he had due notice, to attend at the burial of the plaintiff's child, and "to perform the usual and necessary rites and services."

From the evidence it appears that the child was not born in wedlock. It would seem to be conceded by the plaintiff that, under such circumstances, the priest, according to the usages of the mahomedan religion, would not have been bound to be present at the burial ; but inasmuch as the mother, subsequently to the birth of the child, had been chastised under the directions of the priest, it was contended that "the effect of such chastisement was to purify the woman, and to re-admit her to all the privileges of a mahomedan woman."

The dispute appears to the Supreme Court to be altogether of an ecclesiastical nature. No doubt in the words of Sir W. Morris, "we are bound by law to protect all classes of people in the free and undisturbed exercise of their religious rites and ceremonies." But, on the other hand, as laid down in the same judgment of the same high authority, "if the inquiry be of a purely ecclesiastical nature, it certainly is not the business of this or of any court of justice to decide such matters." *Marshall* p. 657.

We would remark that in the present case, there was no denial of sepulture. The body was buried in the grave yard,

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In the case of *King* v. *Coleridge*, 8 B. and A. p. 806, it was held that the mode of burying the dead is a matter of ecclesiastical cognizance, and the court refused a mandamus to compel burying in a particular manner. It was there stated by Holroyd J.—"It seems to me that the mode of burial is as much a matter of ecclesiastical cognizance as the prayers that are to be read, or the ceremonies that are to be used at the funeral."

We are accordingly of opinion that the judgment of the district court in favour of the plaintiff is erroneous, and that it should be set aside, and plaintiff nonsuited with costs.

July 9th.

Present :—Creasy, C. J., Temple, J. and Stewart, J.

C. R. Kandy, No. 36165. } *D'Esterre & Co.* v. *Charsley.*

Prescription—acknowledgment—authority of English cases.

The material question in this case arose on the Ordinance of prescription. The Supreme Court reversed the decree of the court below in favour of the plaintiff, and said,—

The debt having accrued in 1863, and the action not having been commenced before 1867, the plaintiff is barred by the 6th section of the Ordinance No. 8 of 1834, unless he can bring himself within the saving clause, the 7th, the words of which must be carefully watched and borne in mind. The question is do the three letters of the defendant, which plaintiff has put in, or does any of them, constitute such a promise, acknowledgment or admission that from it the court is *convinced that the debt has not been paid or satisfied.* Unless the court is so convinced, the plaintiff must fail.

The words of the English Statute of Limitations are so different from our Ordinance of prescription, that English cases are of little authority in this matter, and each case must depend on its own circumstances. [And the judges decided that they were not convinced that the debt had been left unpaid.]

July 10th.

1867. July 11.

Present :—Creasy, C. J., Temple, J. and Stewart, J.

C. R. Colombo, No. 48,340 } *Wappo Marikar* v. *Assene Lebbe.*

Court of requests—jurisdiction—servitude of drainage—interest in land—value of land in excess of jurisdiction.

The Supreme Court set aside the decree of the court below, as the case, more fully described in the following judgment of the Supreme Court, was beyond the jurisdiction of the court of request:—

The question in dispute is a servitude of drainage. The defendant says that the plaintiff's land is under a servitude of this kind to his, the defendant's, lands. Both the dominant and the servient lands are above £10 in value. Such servitude, as is here asserted, must be regarded as an interest in land, the value of which land is above £10. Consequently, under the 8th section of the Court of Requests Ordinance No. 8 of 1859, the court of requests has no jurisdiction.

A case of C. R. Matara No. 903 has been cited in favour of the respondent. That was determined under the old Court of Requests Ordinance, the words of which differ from the words of the present Ordinance. The case C. R. Putlam No. 410 decided here on the 23rd June 1863 is also no authority. It was a dispute about trees under the value of £10, and the judgment expressly states that the right to the trees only came in question.

July 11th.

D. C. Colombo, No. 47,261. } *Alagappa Chetty* v. *Sevagan Chetty.*

Lorenz for plaintiff appellant.

Cause of action—place where debt was contracted—jurisdiction.

The order was set aside in these terms :—

It appears to us that as the debt was contracted in Colombo, plaintiff has a right to sue in the Colombo court, and has a right to take all the measures which the law permits for the enforcement of his claim : the affidavits as to the defendant being about to leave the country appear to be sufficient.

The hardship pointed out by the learned district judge which may be caused by an arrest in Kandy under a Colombo warrant, is a reason for strictly enforcing the 5th clause of the Ordinance, and making the plaintiff give very good security that he will pay all costs and damages which may be caused by such arrest if wrongful.

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July 11th.

D. C. Kandy, No. 44,095. } *Soysa* v. *Templer.*

Purchase and sale—misdescription—"about"—conditions of sale—claim for compensation for deficiency—Fiscal and suitor—nature of action.

Plaintiff appealed against the order of the court below nonsuiting him.

Ferdinands (with him *Cayley*) for plaintiff appellant.
Morgan Q. A., (with him *Lorenz*) for respondent.

The Supreme Court set aside the nonsuit and entered up judgment for plaintiff in the following judgment, which is explicit as to the facts of the case :—

In this case the defendant, as fiscal for the Central Province, put up for sale certain coffee estates under a writ of execution against the property of one Ameresekera, and the plaintiff became the purchaser of two lots, and as such purchaser paid the deposit required by the conditions of sale. Before the other instalments were due, he ascertained, as he alleges, that the quantities of the lots purchased by him were far short of the descriptions of amount given in the conditions of sale. He paid the remaining instalment only under protest. The conditions of sale had provided that the deposit should be forfeited if the instalments were not duly paid.

The fiscal has not paid over the money to the execution creditor, but he has obtained an order from the district court of Kandy for the purchase money being retained in that court to abide the event of this suit.

With regard to the first lot purchased by the plaintiff, the printed conditions of sale described it as the coffee estate called Ampitia containing in extent about 300 acres.

At the hearing of the appeal there was a dispute of facts between the parties as to what was sold as Ampitia estate. It was certainly not one block of land: the estate was made up of several parcels. Forty-three deeds were laid on the table at the time of sale as being the title deeds of what was then sold. The plaintiff says that all that he got under the sale was the aggregate of the lands to which these deeds related, and the aggregate average was only 142 acres. It has been contended at the appeal that the plaintiff under that sale became also owner of another distinct parcel of land containing 149 acres which was in the village of Ampitia, and which appears to have been mortgaged at the time of the sale, not to the execution creditor, Rosemale Cocq, but to Dr. Dickman. If these 149 acres are added to the 142 acres which plaintiff admits having got under his purchase of this lot, the difference of acreage between the description and the reality would be only 9 acres, and

that certainly would come within the protection of the word "about." 1867. July 11.

But it seems clear to us as a matter of fact that this parcel of 149 acres (which had been mortgaged to Dr. Dickman) formed no part of what was sold to plaintiff at the fiscal's sale. We think the evidence shews that, though within the village of Ampitia, this 149 acres parcel was not known as part of the Ampitia estate. Moreover the letter from the execution creditor's proctor to the fiscal (which is in evidence) shows that the Ampitia estate, which the fiscal was required to seize and sell, was specially mortgaged to the execution creditor. Accordingly we find that 43 deeds, which relate to and cover the parcels amounting to 142 acres, were produced at the sale as the title deeds of what was being sold. But none of those 43 deeds includes any part of the 149 acres parcel which was mortgaged to Dr. Dickman. Moreover so far from plaintiff having got possession of this 149 acres parcel in consequence of his purchase at the sale, he has actually acquired it since, by an entirely distinct purchase from Dr. Dickman.

We therefore think that the conditions of sale under which the plaintiff bought the first lot, misdescribed it to the extent of 158 acres out of 300.

We think that the word "about" cannot protect the vendor, in the case of so large a deficiency. The English authorities on this subject are to be found in Lord St. Leonards' work on *Vendors and Purchasers* p. 324 and 325, Ed. of 1862. The civil law may be seen in Pothier *on Sales*, p. 108, Cushing's translation.

It is said that the deputy fiscal at the sale told the bidders to look at the plans on the table, and that the plaintiff might, by inspecting and calculating the area of the parcels in each plan, have learned the true aggregate acreage. We do not think that it would have been possible to do this in the haste and confusion of an auction room ; and we hold also that, even if it were practicable, the plaintiff was not bound to do it. Nor was he, in our judgment, bound to go and inspect the lands, and have it measured before he went to bid at the sale. The conditions of sale professed to describe the acreage, and the description had been given by the defendant in the advertisement of the sale in the *Government Gazette*. The plaintiff had a right to trust to that description ; and we are satisfied, as a matter of fact, that he did trust to that description, and that he was misled by it to an extent which cannot be got over by the word "about" in the description.

The conditions of sale under which the plaintiff bought the other lot Bokawelle described it as containing in extent about 150 acres. In reality its extent is only 108 acres. In this instance also we think that the plaintiff was misled by the description in the

1867. July 17. conditions of sale to an extent beyond the saving power of the word "about."

A learned argument was addressed to us on behalf of the defendant to shew that the plaintiff was entitled only to compensation for the deficient quantities, and not to rescission of the contracts. It is unnecessary to enter into this, as the primary prayer in the plaintiff's libel is for compensation. The sum of £2,777 6 4 for which he asks appears to be calculated according to the deficiencies of the acreages.

We think it right to observe that it would in our opinion have been more regular if the execution creditor had been made a party to this suit. But no objection on this account has been raised at any stage of the proceedings, and we do not feel bound to take such an objection ourselves, especially as it is clear that the execution creditor has had full notice of these proceedings and might have intervened, if he wished to be personally heard in the case.

The judgment of nonsuit to be set aside and judgment to be entered for plaintiff, for the sum of £2,777 6 4 with interest on £1,021 1 4 at 9 per cent from 24th August 1865 till payment in full, and interest on £1,756 5 at 9 per cent from 24th November 1865 till payment in full.

July 17th.

Present :—Creasy, C. J., Temple, J., and Stewart, J.

D. C. Kandy, No. 37,801. } *Hadden* v. *Gavin*, et al.

This was an action brought by James Hadden, as executor of the last will and testament of the late Martin Lindsay and as one of the surviving devisees in trust under the said will, against John Gavin, William Clerihew and David Baird Lindsay, the last of whom was the son and devisee of the testator Lindsay, for the purpose of recovering the Dodangallakelle estate and the mesne profits thereof, under the following circumstances.

The late Colonel Martin Lindsay died in Kandy in the year 1847, seised among other things of an undivided three fourths of a forest land called the Dodangallakelle, which, by his last will dated 21st December 1844, he devised to his wife Elsy Lindsay, his son David Baird Lindsay (3rd defendant), his brother Henry Lindsay, his brother-in-law James Hadden, and his son-in-law James Farquhar Hadden, in trust for certain purposes therein set forth. These

trustees were also appointed executors under the will, with power to sell or mortgage the lands thereby given in trust. 1867. July 17.

The will was proved in Scotland, where the testator was domiciled, on the 18th April 1847, by Elsy Lindsay, James Hadden and James Farquhar Hadden, and in Ceylon on the 9th June 1847 by David Baird Lindsay. Henry Lindsay, the fifth trustee, neither proved the will nor accepted the trust therein created.

Before David Baird Lindsay proved the will, he borrowed, on the 28th April 1847, from Clerihew (2nd defendant) a sum of £1,000, to secure which he covenanted in that bond to mortgage within 9 months the Rajawelle and Dodangallakelle lands, as soon as he should have obtained therefor the necessary authority from the other heirs of Colonel Lindsay. As already stated, he obtained probate on the 9th June 1847, and on the 28th February 1848, he applied to the court, and obtained authority to mortgage such of the landed property of the deceased as would be sufficient to raise £12,000, with the view of discharging the claims against the estate and of meeting the necessary expenses connected with the up-keep and cultivation of the plantation belonging to the estate of the deceased.

In pursuance of his covenant and of the authority of the court, David Baird Lindsay, acting as sole executor in Ceylon of the estate of his deceased father, granted to Clerihew, on the 8th July 1848, a bond for the sum of £1,000, mortgaging the land called Dodangallakelle. Nearly five years thereafter, as neither the interest nor the principal was paid, Clerihew put the bond in suit, in case No. 26,485 of the district court of Kandy, against David Baird Lindsay as executor of the deceased Lindsay, and at length on the 13th June 1853 obtained the judgment of the court. Writ of execution followed, and by virtue of it the fiscal seized and put up for sale the Dodangallakelle land, whereof John Gavin became and was declared to be the purchaser.

The plaintiff now sought to have this sale cancelled. At the time he came into court, Elsy Lindsay and Henry Lindsay had died. James Hadden was exempted from the suit, as he took no part whatever in the proceedings complained of. David Baird Lindsay was made defendant only formally.

The plaintiff alleged (1) that the bond of 8th July 1848, which was the foundation of the suit under which the estate was sold, was in operative so far as it purported to affect the estate of the testator, inasmuch as it was granted by only one of the executors and devisees; (2) that the consideration of that bond was a past debt incurred on the grantor David Baird Lindsay's own personal security; (3) that the bond bound him personally and not as executor; (4) that the proceedings under which the land

1867. July 17. — was sold, were grossly irregular and in many respects null and void; and (5) that the alleged purchase and sale was in law fraudulent and collusive.

The libel accordingly prayed that the bond, in question granted by the 3rd defendant (D. B. Lindsay) to the second defendant (W. Clerihew) be declared null and void, as far as the plaintiff and the trust estate of the testator Martin Lindsay deceased was concerned. It also prayed for a declaration that by no proceeding whatsoever, in the suit in the district court of Kandy, No. 26,485, against the defendant D. B. Lindsay, the rights of the plaintiff and the estate of the testator Martin Lindsay deceased were or have been in any way whatever legally or rightfully affected; and that by no proceedings in the said suit in respect of the execution against the effects of the said testator deceased, and the sale thereupon of the Dodangallakelle estate, did the same or any part thereof legally or rightfully pass or become the lawful property of the defendant John Gavin; and that the said decree and execution, as also the said sale, was null and void. And the libel further prayed that the plaintiff be restored to his original rights and put and placed in possession of the said Dodangallakelle estate, on behalf of himself and those whose interests be represented, and further that the defendants be decreed to pay to the plaintiff, as devisee in trust as aforesaid, and for mesne profits the sum of £20,000 with legal interest thereon and costs of suit.

The district judge dismissed plaintiff's case and condemned him to pay the costs of the 1st and 2nd defendants, and the third defendant to pay his own costs, being of opinion (1) that plaintiff had no right to sue, without taking out administration in Ceylon or obtaining a conveyance from the only executor who had taken administration; (2) that the bond of 8th July 1848 created a valid mortgage; (3) that even if there were errors in the proceedings, it was too late to question their validity, especially as they did not work any substantial injustice or injury; and (4) there was no fraud on the part of the 1st and 2nd defendants.

Plaintiff appealed. The *Queen's Advocate* (with him *Dias* and *Temple*) for appellant; *Lorenz* and *Cayley* for 1st defendant respondent; and *Ferdinands* for 2nd defendant respondent.

The Supreme Court set aside the decree of the court below and entered up judgment for plaintiff, in the following judgment:—

In this case the main questions for enquiry were whether David Baird Lindsay, who was one of the executors and devisees in trust of Colonel Martin Linsay, mortgaged a certain part of the testator's estate, being a coffee estate in the island, called Dodangallakelle,

lawfully and with sufficient authority from his co-executors and devisees :—whether the mortgage was made *bonâ fide* and for good consideration on the part of Wm. Clerihew the mortgagee, and without knowledge of any improper conduct of David B. Lindsay's :—whether the mortgagee lawfully put the mortgage bond in suit and lawfully caused the said estate to be seized in execution and sold :—whether John Gavin, the purchaser at the fiscal's sale, became the lawful owner of the estate:—or whether there was such a want of authority and such collusion in the matter that the plaintiff, as executor and devisee in trust under Colonel Lindsay's will, is entitled to have the said proceedings declared null and void, and to be placed in possession of the said estate, and to recover compensation for mesne profits.

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This case in many respects resembles the case of *Lindsay* v. *The O. B. Corporation at Colombo,* which is reported in Moore's Privy Council Reports, vol xii. p. 401, and the earlier proceedings of which are to be found reported in Lorenz 1. p. 31.* This case is well known in this island by the name of the Rajawelle case. The Dodangallakelle and Rajawelle estates both belonged to Colonel Lindsay. They were both devised by him to the same devisees in trust, and by the same clauses of the same will. David B. Lindsay had assumed the power of mortgaging them both. The mortgagee bonds against both had been put in suit by the respective mortgagees, and both estates had been sold at fiscal's sales.

There are however two very important distinctions between the present and the Rajawelle case : the first is that in the Rajawelle case the judgment, on which the fiscal's sale was founded, was a judgment against David B. Lindsay personally, and the Rajawelle coffee estate was seized as the property of David B. Lindsay himself. This is not so in the present case.

The other point of distinction is that in the present case, there is very strong evidence of collusion, such as did not appear in the Rajawelle litigation.

Before however we deal with these matters, it may be well to notice a preliminary objection which was taken on behalf of the 1st and 2nd defendants to the plaintiff's right to sue.

It is said that the present plaintiff cannot sue as executor in Ceylon, as he has not taken out probate here; and that the property having vested in David B. Lindsay, the one executor who did take out probate in Ceylon, the plaintiff could not sue without a conveyance from him. The facts as to this part of the case may be briefly set out thus. The testator died on the 12th January, 1847. There were five executors and devisees in trust under the will, one of whom, Henry Lindsay, never proved or acted in any

* See pp. 37 *et seq* of Râmanâthan's Reports for 1860-62.—Ed.

1867. July 17. way. Three resided in Aberdeen in Scotland and were there at the time of the testator's death. On the 18th April 1847, these three proved the will in Scotland. Scotland was the testator's domicile, and he appears to have had property, or claims to property, there.

On the 9th June 1847, David B. Lindsay (who was in Ceylon at the time of the testator's death) proved the will in Ceylon. He then left Ceylon for a time and reached Aberdeen, (where the said three other executors and devisees still resided) on the 31st July 1847. Between that time and the time of David B. Lindsay's leaving Scotland to return to Ceylon in the latter part of that year, numerous interviews, discussions and business arrangements took place, to which the three abovementioned Aberdeen executors and devisees, as well as David B. Lindsay, were parties : which we think abundantly prove their acceptance of the trusts of the will, and their assuming ownership as devises in trust of the testator's estate, and that all this took place with David B. Lindsay's full assent.

So far as regards testamentary law, we regard landed and other immoveable property here as the English law regards chattels real. We are clearly of opinion that the property vested in the devisees as devisees, and also viewing them as executors, we consider that the Ceylon probate of David B. Lindsay enured to the benefit of the other executors. We follow the English law on this subject, as we believe, that our entire existing law of executors and administrators is a graft of English law, which was introduced here as to one class of the population by the Royal Charter of 1801, and as to all classes of the population by the Royal Charter of 1833, which is still in force. We have set out fully the reasons for this our opinion in a judgment delivered to-day in the district court of Colombo case No. 43,213, *Staples* v. *De Saram.* We do not feel it necessary to recapitulate them here ; but we may observe that the Roman Dutch law would not be very favourable to both 1st and 2nd defendants here ; for under that law the executor was the subordinate officer of the heir, unable to keep the heir out of possession, and also unable to alienate property without the heir's consent. See the 8th chap. of Herbert's book called "*The Dutch Executor's Guide.*" Herbert cites a passage of Vander Keessel respecting executors, in which Vander Keessel says of them "inter alia,—cumque adeo et hæredam negotia gerant, non possunt hæredes ab hæreditate arcere, nisi aliud jusserit testator nec invitis hæredibus bona alienare."

We might probably have been justified in passing over this objection altogether, as disposed of by the Rajawelle case, for the same objection was taken there and argued in the courts below,

though it is not noticed in the report of the proceedings before the Privy Council. 1867. July 17.

Mrs. Elsy Lindsay and Mr. James Hadden are dead; and as the suit is necessarily against David B. Lindsay, as well as the other defendants, he could not be made a co-plaintiff. It seems to us that the present plaintiff's right to institute the suit is free from objection.

Some complexity, which exists as to his respective claims over ¾th and the other ¼th of the estate will be dealt with separately: we now pass on to the substantial matters in controversy.

There are certain main facts in this case which are undisputed, as bare facts, though there is much dispute as to their circumstances.

On the 28th April 1847, being about three months and a half after the testator's death, and before probate of the will was obtained in Ceylon, David B. Lindsay obtained a loan of £1000 from the 2nd defendant, Wm. Clerihew, on a mortgage bond, which mortgaged certain property belonging to David B. Lindsay personally; and also some belonging to a Mr. Hunter, who assented to the same and became a party to the bond.

This instrument did not purport to mortgage any of Colonel Lindsay's estate; but by that instrument, David B. Lindsay bound himself to grant another mortgage bond in lieu thereof within nine months, by which he was to mortgage the Rajawelle estate and this Dodangallakelle land, "securing due and legal power from the heirs of the said Martain Lindsay" so to mortgage the same.

On the 28th February 1848, after he had proved the will in the district court of Kandy (Ceylon), and after he had gone to Scotland, and had had communication there with his co-executors and co-devisees in trust, and after his return to Ceylon, David B. Lindsay applied to the district court of Kandy for authority to mortgage the landed property in Ceylon of the deceased, to a certain amount. His application stated that he had full authority from the other co-executors to mortgage. On this application, he obtained an order of the court to the effect prayed for, on the same day.

On the 13th of March 1848, David B. Lindsay effected a large mortgage on the Rajawelle estate, and on the 8th of July 1848 he executed a mortgage bond in favour of Mr. Clerihew, the 2nd defendant. David B. Lindsay describes himself in that bond as sole executor in Ceylon of Colonel Lindsay. He confesses himself to be indebted to Wm. Clerihew for £1000 for money borrowed, not saying, however, that he was indebted as executor, or that he had borrowed the money as executor. As security for the £1000, he

1867. July 17. mortgages some property of his own, and also this Dodangallakelle property, which he describes as the property of Colonel Lindsay deceased. And he states that he was authorized to mortgage this estate by the abovementioned order of the district court of Kandy. He lastly declares that he bind himself and all his property, as well as all the property of the testator Colonel Lindsay.

No money passed on the giving of this second bond. It was treated as given in substitution for the bond of the 28th April 1847.

On the 12th March 1853, Mr. Clerihaw began proceedings in the district court of Kandy on the mortgage bond. On the 13th June 1853 judgment passed against David B. Lindsay in his absence, the decree being that he, as executor, should pay the £1000 with interest. On the 16th June 1853, a writ issued in the suit to seize the property of Martin Lindsay deceased. This Dodangallakelle estate was seized under the writ, and on 18th July 1853 it was sold by fiscal's sale. The 1st defendant, John Gavin, became the purchaser for the sum, real or nominal, of £100 ; and on the 20th July the fiscal conveyed to John Gavin.

The primary transaction, the root of all the rest, is the loan of £1000 by Mr. Clerihew to David B. Lindsay in April 1847, before he became executor, and before he could have any power to charge the estate.

Was this money borrowed by David B. Lindsay and lent by Mr. Clerihew for the purpose of keeping up the deceased's estate? Or was it money borrowed and used by David B. Lindsay for his own purpose?

David B. Lindsay says in his evidence before the first commission, that he borrowed the money and used the money for the up-keep of the estate, that when he got the money it was paid into his agents Hudson and Chandler, and drawn out by degrees for estate purposes.

We greatly doubt this story. David B. Lindsay's conduct throughout these transactions has been such as to make it necessary to receive his evidence with caution. And there is much in the case to make us believe that this £1000 was borrowed, in part at least, by David B. Lindsay, for his own private purposes, and that Clerihew knew it. There is no doubt about none of it ever having been employed in the cultivation of Dodangallekelle. Dodangallekelle was not opened or planted, but remained mere forest land until after Mr. Gavin's purchase in 1853. But was this a loan for the benefit for Coloned Lindsay's property generally in Ceylon? The letter of 19th April 1847 in which David B. Lindsay asks for the loan, leaves no such impression after reading it, nor is it at all likely that he should have lodged so large a sum as £1000 in

the hands of Hudson and Chandler, who were then in difficulties, or, in his own phrase, "at the end of their tether." This letter and that of 28th April 1847 from Mr. Stewart, (to whom and not to Hudson and Chandler he wished the money to be paid), seem to shew that he wanted the £1000, or as much of it as possible, down at once, to meet some instant emergency. 1867. July 17.

On the 9th of June 1847, David B. Lindsay proved the will in Ceylon, and soon afterwards must have sailed for Europe, as he arrived in Aberdeen in the close of that year. The mortgage bond by him to Mr. Clerihew which first purported to bind this Dodangallakelle property was not executed until the 8th day of July 1848; but on the 28th of the preceding February, David B. Lindsay had obtained an order from the district court of Kandy authorizing him to mortgage the estate property to the amount of £12,000. In his application to the district court for that order, David B. Lindsay stated that he held full authority from the other executors to mortgage the landed property in Ceylon.

The court below has found as a fact that this allegation is true, and that David B. Lindsay held a power of attorney from the other executors, which was either a power to him solely, or a joint and several power to him and to a Mr. Charles Clerihew.

We entirely differ from that finding.

It is certain that a power of attorney was sent out by the Aberdeen executors in 1847, before David B. Lindsay's application for leave of court to mortgage in March 1848. The question is whether that was a joint power to David B. Lindsay and Charles Hadden, or whether it was a joint and several power, or any power under which David B. Lindsay could act alone?

David B. Lindsay was the first witness who spoke about this power of attorney. He said in his examination before the first commission that his co-executors sent him out a power of attorney to himself and Mr. Charles Hadden, which was the only authority he had. He said further that he had not got that power of attorney, but that it had been left by him in Ceylon among a mass of papers, which, he was told on his return there in 1860, had been all destroyed, and that he could get no account of them. He said further that when he had obtained the order for the mortgage in March 1840, he knew that the power of attorney did not in law authorize him to do so, but that he thought he was morally justified in doing so, inasmuch as Mr. Charles Hadden had then left the island,—a contingency which had not been foreseen or provided for.

As we said before, we regard Mr. David B. Lindsay's evidence in this case with much caution; but the fact of the existence of a sole or several power to David B. Lindsay (if a fact), was one for the defendants to prove; and in the absence of any other proof on

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either side, David B. Lindsay's evidence the other way would be enough. But on the first trial in the district court, Mr. Smith, a proctor, who has acted in these matters, sometimes for one defendant, sometimes for another, gave evidence that be had on behalf of David B. Lindsay made the application for leave to mortgage in March 1848, and that before that was done David B. Lindsay had produced to him a power of attorney, which was either a power to him, David B. Lindsay, solely, or to him and another jointly and severally. On affidavits which were produced before us on behalf of the plaintiffs, when this case first came up in appeal, we thought it just and fair to give opportunity for further evidence respecting the true nature of the last power of attorney ; and evidence was accordingly taken on commission, which satifies us beyond all question that the power of attorney given by Aberdeen trustees was a joint power, and not a joint and several power. We do not say that Mr. Smith deliberately perjured himself ; but even without the opposing evidence given under the 2nd commission, his testimoney as to this matter is subject to grave suspicion. Mr. Smith was one of the proctors for the defendants in the Rajawalle case. The fact of David B. Lindsay having held a power authorizing him solely to effect mortgages would have been very important in that case. The trial of that case was nearer to the time of the transactions in question than the trial of this case was. Yet Mr. Smith, throughout the Rajawalle proceedings, never remembered the existence of the sole or several power of attorney. Careful attention should be paid to his answers to some of the specific questions in the present case, and to his statement when recalled, that "in the present case, the power of attorney was prominently brought to his notice by counsel," and that he would not have made the allegation as to David B. Lindsay's power to mortgage, in the application to the court, if the power had been a joint power only in favour of David B. Lindsay and another. This immediately precedes the following question and answer :—

" *Q.*—Then to the best of your recollection and belief, it was a joint and several power ?

" *A.*—Yes ; if it was not a sole power to Lindsay, it must have been a joint and several power. Had it been a joint power, I should have told him that he could not have acted on that power."

We cannot help feeling convinced that Mr. Smith had no actual memory as to the matter : but that, when it was pointed out to him, how very culpable the allegation in the application to the court was, unless the power was several, he allowed his self-esteem to reason him into an imaginary recollection.

It is due to the learned counsel, who very ably argued the defendant's case before us, to say that they did not adopt one of the reasons by the district judge in his second judgment against the plaintiffs, that there had not been sufficient search for the original power of attorney. It was fairly admitted to be proved that a joint power, of which the draft was laid before the court, had been sent out to David B. Lindsay in Ceylon, as stated by Sir Alexander Anderson. But it was suggested that probably a second power, a sole or joint and several power, had been sent out, when it was found that Charles Hadden (to whom power had been given jointly with David B. Lindsay), was likely to leave Ceylon in the early part of 1848. But there is no proof of such a second or distinct power. The evidence of Sir Alexander Anderson and his clerks is clear that the joint power was the only power ever prepared in his office; and there is no proof or suggestion that the family employed any other legal adviser or practitioner. 1867. July 17.

There are some other matters as to this power which deserve attention.

It had been sent to David B. Lindsay originally in 1847, he must have still had it when he returned to Ceylon about the end of that year. Charles Hadden, named in the power to act with him, was, and for sometime had been, a planter here. Charles Hadden did not leave Ceylon till the end of February or beginning of March 1848. David B. Lindsay must have been in the island with Charles Hadden during nearly all the first two months of 1848. David B. Lindsay never asked Charles Hadden to act under the power with him, and to effect an estate mortgage in substitution of David B. Lindsay's personal bond of April 1847; but directly Charles Hadden is on his way to Europe, David B. Lindsay acts alone. Charles Hadden left the island, as he says, "in the end of February or the beginning of March 1848." The overland route was open as now. The end of February, or one of the earliest days of March, would have been the ordinary time for the steamer leaving Galle. By the 28th February, Charles Hadden must have left the plainting districts on his way to Galle, and on the 28th February it is that David B. Lindsay makes the application to the court for leave to mortgage. All this looks very much as if the primary loan in April 1847 was for money borrowed by David B. Lindsay for himself, and not for the estate; and seems to shew that he knew that it was useless to ask Charles Hadden to concur in burdening the estate in respect of it. While Charles Hadden was in the neighbourhood, such an application to the district court as that of 28th February 1848 might have been heard of by him and objected to; for it is in evidence that he, Charles Hadden, had been apprised by letters from England of the joint power.

1867. July 17. But directly Charles Hadden was on his way for Europe, there was no immediate risk of opposition or exposure, and the proceedings to mortgage the estate and relieve David B. Lindsay from his bond of April 1847 commenced. The pause between the obtaining the order of court in February 1848, and the mortgaging this property in July 1848, is explained by reference to the Rajawalle case which shews that in the interval David B. Lindsay, under color of the same order of court, effected a large mortgage of the Rajawalle estate.

We now come to the question whether Mr. Clerihew, when he took the mortgage on the estate in 1848, in substitution of David B. Lindsay's bond of 1817, knew of David B. Lindsay's want of authority.

The terms of the bond of April 1847 by which David B. Lindsay undertook to substitute a bond on the deceased's estate, "securing due and legal powers and authorities for the heirs so to mortgage;" prove that both parties knew David B. Lindsay not to possess the authority at that time. Mr. Clerihew in his evidence says; "In pursuance of the covenant in the first bond of 1847, the bond of 1848 was granted to me by Mr. Lindsay. Mr. Lindsay told me in Mr. Smith's office that he had the power to mortgage Dodangalle which he had not before."

It seems very strange that Mr. Clerihew, a man of business, did not ask to see the instrument by which David B. Lindsay had acquired the power. On this being mentioned, during the argument, it was suggested that probably Mr. Smith, as Mr. Clerihew's proctor, inspected it for him. But Mr. Smith's evidence shews that, in part of the transaction, Mr. Smith was acting for Mr. David Baird Lindsay, and not for Mr. Clerihew. Now let us look at the next step taken. A false allegatiou is made to the district court that David Baird Lindsay had full power from his co-executor, to mortgage. Certainly to this Mr. Clerihew is not proved to have been party. But the order of court is recited in the bond to which he is party. And, without forgetting that Mr. Clerihew is not a lawyer, we think it strange that a man of business did not look closer to the documents; and that it did not occur to him that, if David Baird Lindsay really held a power to mortgage from his co-executors, no order of the court at all was necessary. Administrators are sometimes restrained by the terms of the letters of administration from alienating landed property without leave of the court. Executors are under no such restriction. This whole proceeding by way of order by the district court looks as if the parties knew well that there was no legal power in David Baird Lindsay to mortgage, and that they were seeking to make up a colorable title under order of court. At the same time that the mortgage

bond was executed, Mr. Clerihew took two bills from David Baird Lindsay for £500 each, drawn upon, and afterwards accepted by, his mother Mrs. Elsy Lindsay. It will be necessary to make mention of these bills presently. 1867. July 17.

Soon after giving this second bond, David Baird Lindsay seems to have left Ceylon, and to have been principally in Calcutta or Australia till the beginning of 1853. Mr. Clerihew did not cultivate Dodangalle, but it remained forest land till 1853, when it came into possession of Mr. Gavin, the first defendant, under circumstances which must be closely watched to see whether they throw any light, and what light, on the question of Mr. Clerihew's knowledge of the real nature of David Baird Lindsay's proceedings, and also as to similar knowledge on the part of Mr. Gavin.

Mr. Clerihew in March 1853, through Mr. Smith, who then acted as his proctor, took proceedings in the district court of Kandy against David Baird Lindsay on the mortgage bond of July 1848. There were some grave irregularities (to say the least of them) in the conduct of this suit. But we do not feel it necessary to discuss them here : on the 13th of July there was judgment against the defendant, as executor, for the full amount of the bond with interest from date. On the 16th July, a writ in the suit issued against the property of the testator, under which writ this Dodangalle estate was seized. On the 18th of July 1853, it was sold by fiscal's sale to Mr. Gavin, to whom it was, on the 20th of the same month, conveyed by the fiscal. The nominal purchase money was £100. From a letter of Mr. Clerihew of 19th March 1853, and from Mr. Gavin's evidence, it seems that the real agreement between Mr. Gavin and Mr. Clerihew was that Mr. Gavin was to pay the mortgage money both principal and the interest due on it. The money was not to be paid in cash, but there was an arrangement between them that Mr. Clerihew was to advance money to Mr. Gavin to open and cultivate the estate with, and that Mr. Gavin's retention of the mortgage was to be treated as equivalent to the advance by Mr. Clerihew of a corresponding sum. £6,000 altogether was advanced by Mr. Clerihew. Mr. Gavin says that that he did accordingly debit himself and credit Mr. Clerihew with £1,616 18 6 that being the amount of principal and interest due on the bond up to the date of the sale. Mr. Gavin and Mr. Clerihew are not agreed as to the details of the arrangement between them, but the real state of the case seems to have been as we have described it ; and our opinion as to this is confirmed by the latter part of the 24 paragraph of the 2nd defendant Mr. Clerihew's answer.

With regard to Mr. Gavin having notice of the defect in the title, we are satisfied after careful examination of the evidence,

1867. July 17. that at the time of the arrangement between Mr. Clerihew and Mr. Gavin as to the purchase by Mr. Gavin, and at the time of the purchase itself, both Mr. Clerihew and Mr. Gavin knew the title to be questionable.

Mr. Gavin admits in his evidence that he knew at the time of the fiscal's sale that proceedings had been already commeuced by the Lindsay family to recover the Rajawalle property, and it must have been notorious that in that case the family were disputing David Baird Lindsay's authority to mortgage the family property in Ceylon. Mr. Gavin certainly states in his evidence that he was advised that there was no analogy between the Rajawelle case and this ; but his own acts after his purchase in cooperating with Mr. Clerihew in the attempts (which will presently be referred to) to get the title confirmed by the Lindsay family, are grave proofs that he knew the title which he was acquiring by the fiscal's sale to be a doubtful one. Mr. Clerihew says in his evidence respecting the arrangement between himself and Mr. Gavin, that he wished to secure himself from suffering any risk from title, though he adds rather inconsistently that he had no doubt about the title. He says in a subsequent part of his evidence,—"What I wanted was that Messrs. Pitts and Gavin should buy the land in my name, and I was to reconvey to Gavin. I would then have been the seller to Mr. Gavin. I intended taking that course in consequence of a defect in the title of which I had been informed by Mr. Tytler. I would have eschewed all risk of title in the conveyance I made to Gavin, and this was in accordance with my agreement with Gavin, that he was to take all risk and chance of title. I made no objections afterwards to Mr. Gavin's purchase at the fiscal's sale, though I did not approve of it, as I was told that all the risk of title fell upon him. It was in accordance with my arrangement with Mr. Gavin that Messrs. Pitts and Gavin were to buy the land for me, and I was to reconvey to Gavin and then protect myself from all risks as to warranty to title. This was understood on both sides. The purchase was made by Gavin in his own name to save the fees and trouble."

There is also the evidence of Mr. Tytler on this subject. Mr. Tytler was a coffee planter. He was here in 1853 and had thought of buying this Dodangalle estate himself. His evidence deserves attention. He says "I know Mr. Clerihew. I know the land in dispute. He made a proposal with reference to it. He told me he had this land which he could put me in possession of, and money that he could lend me in order to form a plantation upon it. The terms of the proposal were, the money to be lent at 10 per cent, the capital not to be called up, the price I was to pay for the land

at about £3 an acre (about £1,530 for the lot), I was to pay the interest regularly, and might reduce the block by selling the property ; I could discharge myself from the obligation but he could not compel me ; I think there was a period of four or six years, during which I was not to be called upon to pay the money ; I was to pay the interest all the time regularly. I knew the land to be Lindsay's, but we did not come to particulars about the conveyance. Though the terms were favourable, I did not go into further details, because I was advised not to do so by Mr. Morton. Mr. Morton was a lawyer. What Mr. Morton told me I communicated both to Mr. Gavin and Mr. Clerihew, I told them to the effect that Mr. Morton thought that the land held under Martin Lindsay's will was open to the same question as the Rajawelle case, and that whoever took over land under that will would be liable, and be certain to be disturbed, and he asked me 'whether it was worth my while to go into the proposition and run the risk.' There might be circumstances which rendered the title good, might have enabled one to defend an action for it, but it was not worth while to run the risk. Mr. Clerihew said nothing to this. I conversed with Mr. Gavin on this subject. He thought the title good, and that my scruples were over cautious, and that he had no hesitation in acting on the proposal. I was aware of the proceedings in the Rajawalle case. I spoke to Mr. Gavin about that time. The existence of that case was matter of notoriety in the island. I knew Dodangalle at that time. It was then worth about £3. 5 per acre. I would gladly have given that amount. It may have been worth more or less. Mr. Gavin and Mr. Clerihew both said that there were circumstances in this case which put it in a different category from the Rajawalle case. The facilities as to advance of money held out by Mr. Clerihew formed one of the reasons which made me originally entertain the proposal favourably."

Mr. Tytler's evidence is important as fixing Mr. Gavin as well as Mr. Clerihew with knowledge that the title was questionable, and also as explaining how it was that Mr. Gavin with such knowledge gave (as he virtually did give) so much money as £1,616 for the land, which would be, according to Mr. Tytler's evidence, within about £150 of what the full value would have been if the title had been clearly good. The inducement to run the risk was the very favourable nature of Mr. Clerihew's offer about lending money to open and work the estate with. As to this the letter of Mr. Clerihew to Mr. Gavin of the 19th March 1853, which formed the basis of the arrangement between them is very strong and clear testimony.

As to the fact of Mr. Gavin's knowledge that he was buying a

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questionable title, there is even stronger proof than the evidence on which we have commented already.

We refer now to the applications for a confirmation of title which were made soon after the sale to the present plaintiff in Aberdeen by Mr. Clerihew's brother, acting under Mr. Clerihew's directions. Mr. Gavin himself admits that he knew of this. And there is also the extraordinary letter on this subject of the 6th September 1853, written by Mr. Clerihew to Mrs. Lindsay, and which Mr. Clerihew in his evidence states to have been written by him at Mr. Gavin's request. Mr. Gavin also himself says that he wrote to Mr. Clerihew to get a confirmation for him of the sale from the trustees.

That letter is among the papers annexed to the 2nd defendant's answer. We will not repeat it at length here, though every word of it deserves attention, but we must take special notice of the first paragraph, which suggests grave reflections. In it Mr. Clerihew says to Mrs. Lindsay :—

" Mrs. Lindsay, " Ballater, 6th September, 1853.

" Madam,—my present purpose in writing to you has reference to a piece of uncultivated land, which I understood to belong to your son Mr. D. B. Lindsay, having been made over to him by his father and which was mortgaged to me in part security for my loan of £1,000, for which amount I also hold his bills endorsed by you."

How is this consistent with the defence in this suit that Mr. Clerihew took the mortgage of this bond from David B. Lindsay as executor, believing at any rate that David B. Lindsay had acquired power from his co-executors to mortgage this land in 1848, though he had not such power in 1847 ?

The bills are those spoken of in a former part of this judgment. They were properly speaking collateral securities for payment of the mortgage money ; and when the mortgage was paid off, as it virtually was, by the dealing between Mr. Gavin and Mr. Clerihew, these bills ought to have been given up or cancelled. But Mr. Clerihew, with Mr. Gavin's consent, not only retains the bills and threatens Mrs. Lindsay with them in this letter, but it is in his own evidence that he afterwards obtained £296 on these bills from Mrs. Lindsay's estate. It is favourable to Mr. Clerihew to suppose that there must have been money transactions between him and David B. Lindsay personally ; and this all strengthens the impression which other parts of this case made upon us, that the original loan in 1847 was got by David B. Lindsay for his own purposes, and not for the good of Colonel Lindsay's estate, and that Mr. Clerihew knew it.

We are clearly of opinion that David B. Lindsay mortgaged this Dodangallakelle estate without lawful authority to do so. That the mortgage, and the district court proceedings founded upon it, the sale to Mr. Gavin, and the conveyance are all invalid ; and we find specifically that Mr. Clerihew knew David B. Lindsay's want of authority at the time of the mortgage, and that Gavin had notice of it at the time of his purchase ; and that there was collusion between David B. Lindsay and Mr. Clerihew, and that there was collusion between Mr. Clerihew and Mr. Gavin. 1867. July 17.

We also find that there has been no acquiescence or laches on the part of the plaintiff, so as to bar him from now recovering.

There is a difficulty in this case arising from the plaintiff claiming as devisee in the early part of the libel in respect of $\frac{3}{4}$th only of the estate. The facts appear to be that Colonel Lindsay intended David B. Lindsay to have $\frac{1}{4}$th of this estate, and there is a memorandum in David B. Lindsay's favour; but there was not, so far as we can see, any deed or instrument in his favour which could pass landed property in Ceylon. But the defendants have certainly no right to hold this $\frac{1}{4}$th as under David B. Lindsay. The judgment of the district court was a judgment against David B. Lindsay as executor, and not personally ; and the estate was seized and sold as part of the testator's, Colonel Lindsay's property, and not as the property in any degree of David B. Lindsay's. Colonel Lindsay's will, besides the specific devisees in the commencement, has at the end a general devisee to the same devisees, under which this $\frac{1}{4}$th would pass ; and the prayer for relief is explicit and full enough to authorize us in decreeing to plaintiff possession of all the estate, without prejudice to any claim to this $\frac{1}{4}$th which David B. Lindsay may be able to substantiate.

The decree of district court Kandy of 23rd April 1866 is set aside and judgment entered for plaintiff. The mortgage bond of 8th July 1848 is hereby declared to be null and void, so far as regards the plaintiff and the trust estate of the said testator Martin Lindsay ; and the proceedings in D. C. Kandy No. 26,485 were and are invalid to affect the said estate of the said testator ; and the said fiscal's sale of the said Dodangallakelle estate in the libel mentioned was similarly invalid ; and the conveyance thereof to the defendant, John Gavin, was and is invalid, null and void. The plaintiff, as executor and devisee in trust of and under the will of the said Colonel Lindsay to be put and placed in possession of the said Dodangallakelle estate and premises ; and the first and second defendants jointly and severally to pay to the plaintiff, by way of damages or mesne profits a sum equal to the nett profits of the said estate, since the same has been opened and cultivated to

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the time of the plaintiff being placed in possession, such nett profits to be cultivated after allowing for useful expenses (as stated below); and it is further adjudged against the first and second defendants, jointly and severally, that they pay the plaintiffs costs of the action and of the appeal, excepting those costs which the plaintiff and appellant, were ordered to bear, and pay by the judgment of this court of the 30th November 1865.

The third defendant is to pay his own costs, any of the parties to be at liberty to apply for further directions.

With regard to mesnè profits, we think that the plaintiff is entitled to them on a calculation of nett profits to the time when possession is given up, after allowing for all useful expenses: but disallowing the four undermentioned sums which have been claimed on the part of the defendants :—

1.—£1,616 for purchase money, except so far as regards £100 which plaintiff has stated his willingness to allow, and which for that reason only we allow.

2.—The charge of £150 a year and interest thereupon charged by Mr. Gavin.

3.—Charge of 12 per cent on the whole : and

4.—The charge for commission at $2\frac{1}{2}$ per cent.

We understand that the parties have agreed to a calculation of figures. If not, the figures must be referred to the registrar to calculate, with power to call in two merchants as joint referees.

D. C. Kurnegala, No. 17,335. } *The Queen's Advocate* v. *Mudelihamy,* et. al.

Ordinance No. 6 of 1855, cl. 11 —recognizance—proceedings thereunder —practice— necessity of stamps— recovery of costs on behalf of the crown.

The following judgment of the Supreme Court sets out the facts of the case :—

The question for consideration in this case is whether the proceedings under the 11th section of Ordinance No. 6 of 1855 for the recovery of the amount due on a recognizance to Her Majesty are of a purely criminal character, or whether they are of a civil nature rendering stamps and costs recoverable on behalf of the crown as in other crown suits.

It would appear that the practice up to the time of the judgment now appealed from has been to regard the procedure as civil, and accordingly to allow the D. Q. A. to recover the amount of both stamps and costs. See also *Sir Chas. Marshall's judgments*

p. 280: "But recognizances when forfeited are properly sued for by civil action." 1867. July 17.

The Supreme Court has carefully examined the Ordinance and is of opinion that the procedure hitherto prevailing is neither wrong nor unauthorized.

In this view, besides the reasons we are about to give, we are confirmed by the collective judgment of our predecessors (see *R.* and *O.* p. 109) in D. C. Negombo No. 10,424, where it was held that the proceedings under the Ordinance No. 12 of 1840 for the summary ejection of parties from crown lands, are civil and not criminal.

We should moreover observe that in the rules and orders of September 16th 1842 for regulating the proceedings under the said Ordinance No. 12 of 1840, there occurs the following direction "here set forth distinctly the nature and description of the offence," and further in the prayer are these words "that upon due proof and conviction thereof &c." No expression so strong in favour of the construction now given by the district judge occur in the Ordinance under consideration.

In the first place, irrespective of the Ordinance, it is clear that a recognizance only creates a civil liability to be sued for and recovered by civil action. Blacks Com. ii 341: "a recognizance is an obligation of record which a man enters into before some court of record or magistrate duly authorized. It is in most respects like another bond: the difference being chiefly this, that the bond is the creation of a fresh debt or obligation de novo, the recognizance is an acknowledgment of a former debt upon record; the form whereof is that A. B. doth acknowledge to owe to our lady the Queen, to the plaintiff, to C. D., or the like, the sum of &c.' with condition &c." Again 4 Blacks. Com. p. 252: "If the condition of such recognizance be broken, the recognizance becomes ferfeited or absolute; and being estreated or extracted (taken out from among other records) and sent to the exchequer, the party and his sureties, having now become the Queen's absolute debtors, are sued for the several sums in which they are respectively bound."

In the passages from which the above extracts are taken, allusion is made to recognizances entered into before a magistrate or a justice of the peace, in respect of a criminal offence. See also *Mannings' Exchequer*, p. 316, where in a note reference is made to a recognizance in a case of embezzlement.

The recognizance now before us is in the criminal form. The fact that it was given for the appearance of a criminal offender cannot in our opinion alter the character of the recognizance itself.

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Tho criminal is not necessarily the sole party to the obligation, and, as in the present instance, he may have co-cognizors as sureties to whom no criminality is attachable, and who can only be regarded as mere debtors to the crown.

Then is there anything in the Ordinance No. 6 of 1855 which renders wholly criminal that which was heretofore a civil proceeding?

The 11th section does not alter the nature of the liability or of the proceeding. This section seems to us only to affect the mode of procedure by authorizing a summary process as an alteration in place of the ordinary and more formal and dilatory suit by information. An application is to be made by the Queen's Advocate or D. Q. A. for a summons, and then, as prescribed in the action, a warrant of distress is to issue "to recover the amount due, together with reasonable costs of such application by distress and sale of the property of the debtors.

The first part of the Ordinance deals with the recovery of pecuniary penalties awarded by any court upon conviction. But it is remarkable that, in the 2nd section which relates to the recovery of such penalties, the expression used to denote expenses is different from that employed in the 11th section. In the former section the words are "reasonable charges," the corresponding words in the latter section are "reasonable costs of such application."

This change of expression does not appear to be without significance. In the recovery of penalties, the interference of the Queen's Advocate is not required. It is otherwise as respects recognizances. He is to make the application: his intervention is necessary, and he is to be allowed his "costs:" a term perfectly familiar and well-known in our civil procedure, and apparently made use of in the stead of "charges," a word used in connexion with the undoubtedly criminal portion of the Ordinance.

As respects the proviso at the end of the 11th section whereby, if no sufficient distress can be had, the parties are liable to be proceeded against, as provided by the 5th cl., it appears to us that though in such cases the debtors are required to be imprisoned with or without hard labour in the direction of the court, this does not necessarily determine that the antecedent proceeding was not civil. The proviso, in our opinion, is in addition to and intended, if need be, to follow the civil liability.

Accordingly, stamps being recoverable in crown civil cases, we hold that the judgment of the district court is erroneous and that the Deputy Queen's Advocate is entitled to include in his bill the amount charged by him. As to what should be reasonable costs,

it is difficult to fix upon any stated rule. No rule is given; but we recommend that as far as is practicable, the costs should be taxed according to what the crown would be allowed in an action upon a bond for a similar amount.

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The chief justice has some doubt upon the point, but he is not convinced to the contrary, and it is not thought desirable to delay any longer the adjudication of this case.

Order of the court below set aside.

D. C. Colombo, No. 43,213. } *Staples* v. *De Saram*, et. al.

Administration—liability of administrators to heirs—devastavit—breach of trust—neglect to render accounts—law of executors and administrators in Ceylon—English law—Roman Dutch law—purchase by trustees of trust property.

This was an action brought by three of the heirs of the late Mr. W. A. Staples, against Mr. C. H. de Saram, the administrator, and against the executors of Mrs. Smith, the administratrix, of the estate of deceased, praying for damages and for a further account of such administration.

The intestate, W. A. Staples, died in Kandy on the 22nd May 1848, leaving issue, the plaintiffs and a daughter who did not join in the suit. The eldest child was about 9 or 10 years old at the time of their father's death, and their mother had died before him; but there were brothers of their father then living in the colony, who were his next of kin. On the 23rd May 1848, the day following the death of W. A. Staples, the first defendant, who was not in any way related to the deceased, applied for administration of his estate, on the ground that "he was an intimate friend, and was willing to administer the estate, with a view to secure the interests of the intestate's children." Upon this application, citation was issued to the next of kin, but none appeared. Mrs. Smith, however, who was the mother of the deceased's wife, but in no way of kin to him, came forward and applied for administration: thereupon the court granted joint administration of the deceased's estate to the two applicants on the 29th May 1848, and they proceeded to deal with and dispose of the property of the estate.

The plaintiffs dissatisfied with their administration raised the present suit, complaining that the administrator and administratrix rendered no account of their dealings, and they also complained of severals acts of mal-administration.

With reference to the first act complained of, viz. neglect to render accounts, the learned district judge fouud as follows,—

"On reference to the proceedings in the testamentary case, we find that an inventory was filed on the 8th June 1849, and that the administrator filed two provisional accounts dated respectively

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29th November 1849 and 22nd October 1850, shewing receipts from the disposal of the property of the estate amounting to £2,004 4 1½. The administration has filed eight different accounts commencing with the 20th August 1849, and ending with the 28th April 1849, and bringing the accounts of the estate down to the end of 1857. There is also evidence of an account having been filed afterwards by the administratrix ; but of this there is no record in the case, the secretary of the district court of Kandy having most improperly allowed it to pass out of his hands. Of the accounts actually filed, not one has been passed by the court. The two accounts of the administrator and the first two accounts of the administratrix were laid before the secretary of the court and heavily surcharged. Of these surcharges, which related principally to the non-production of vouchers, explanations in writing were handed in by the administrator and administratrix, in which many of the wanting vouchers are said to be produced, but these explanations are not certified by the secretary as correct ; on the contrary, a day (2nd September 1850) was fixed for the administrator and administratrix to shew cause why they should not be debited with the sums uncharged. On this day nothing appears to have been done ; but by a subsequent order of the 5th November 1850, the 22nd of that month was fixed for the purpose of hearing the administrator and administratrix on this point. This hearing was again, by successive orders, postponed to the 29th November 1850, 6th December 1850, 13th December 1850, 13th January 1851, 24th January 1851, when the matter was again allowed to drop. On the 15th March 1851, a fresh order was made, fixing a day for the court to decide on the secretary's report ; but again after several postponements, it was allowed to drop ; and though the administrator and administratrix were from that time until the year 1859 frequently but ineffectually called upon by the court to file a final account of the estate, nothing was said about auditing or settling the accounts already filed until the 3rd May 1859 ; when the secretary was again called upon by the court to examine all the accounts then filed ; upon which the secretary made his report that it was impracticable to check the accounts, and on that, the administratrix was ordered to file a proper account of her dealings with the estate from the commencement to date. With this order she failed to comply, and ultimately on the 4th March 1861 administration was withdrawn from the administrator and administratrix, and granted to the 1st plaintiff in the case, who obtained letters of *venia aetatis* for the purpose, and has since wound up the estate. With regard therefore to the original administrator and administratrix, the case stands thus. They obtained letters of administration to the estate of the deceased in May 1848, and have

rendered no accounts whatever, that is, no account approved by the court by which administration was granted, though frequently warned to give explanation of the objection to the accounts actually filed, and to file further accounts of their dealings with the estate. 1867. July 17.

"The plaintiff have therefore in the opinion of the court fully made out their right to an account, in which all the items already debited against the administrators and administratrix should be brought to account against them, and such items only allowed as can be verified by good and sufficient vouchers or proof.

"The difficulty of producing such vouchers or proof arises entirely from the delay and negligence of the 1st defendant and the administratrix, and it is right that they should pay for it rather than that the plaintiffs should suffer any loss by the negligence of those respecting their interest during their minority."

And the district judge proceeded as follows:—

"We now come to consider the several charges brought against the defendants for specific acts of mal-administration, not mere matters of account. The first of these charges relates to the sale of the share of the deceased in a coffee estate, called the Hattale estate, of which he died seised in common with his brother Mr. John Staples, then the district judge of Kandy. This estate was retained in the hands of Mr. John Staples and the administrators, and worked by them from the death of Mr. W. A. Staples until July 1849, and was then put up for sale at public auction, and sold to Mr. John Staples for £2,100, of which £1,055 was payable to the estate of W. A. Staples, nine months after the date of the sale, (which took place on the 28th July) but without interest. At this time Mr. W. A. Staple's share of the expenditure for the current year amounted to £180, and, as it afterwards appeared, a sum of £200 was due to him as his share of the nett proceeds of the sale of the former crops of the estate. Of this sale the plaintiffs complain:—1st, that the estate was sold for far less than its real value; 2nd, that the sale did not take place on the day on which it was advertised, but two days afterwards and without advertisement; and 3rd, that the first defendant in breach of trust sold the estate without authority from the court, and during the minority of the heirs.

"Passing over the first point for the present, on the second point the court finds in favour of the defendants. It is clear that the sale was properly advertised, and took place on the day fixed in the advertisement. The plaintiffs have been led into the mistake by an error in one of the accounts filed in the case, in which the day of the sale is stated to have been the 30th July instead of 28th; but of the real fact there can be no doubt that the sale took place on the 28th. This supposed irregularity in the same was

1867. July 17. made the ground for a charge of fraud and collusion between the late Mr. Staples and the 1st defendant. The court thinks it right therefore here to state that there appears to be no ground for any charge of fraud against the 1st defendant, either with reference to this or any other matter brought against him, though there is too much reason to accuse him of negligence and want of consideration for the interests committed to him, by which those interests have materially suffered.

"With regard to the charge of selling without authority of the court, if by this it is intended that the administrators had not power under the letters granted to them to effect a valid transfer of the real property of the deceased, the court must again find in favour of the defendants. The letters of administration, of which a copy is filed in the administration case, contain a power to dispose of the property and estate rights and credits of the deceased, and there is no clause requiring a reference to the court for authority to sell real property; and it has invariably been held by courts of this country that under such a power an administrator has to sell the real as well as the personal property of the intestate.

"But the court is of opinion that the manner under which the sale was effected, and the conditions to which it was subject involve a decided breach of trust on the part of the defendants. It has been seen that the defendant carried on the cultivation of the estate jointly with Mr. J. Staples for upwards of a year after taking out administration, and that he had rendered the estate liable for a sum of £180 as his share of the expenditure during the year 1849. This sum was of course expended with a view to repayment and profit out of the coming crop; but in July 1849, the defendant finds that he can no longer procure funds to carry on the cultivation of the estate, and therefore, at the instance of his co-tenant Mr. Staples, though evidently against the opinion of the administratrix, the estate is advertised for an unreserved public sale subject to the unusual condition of nine months credit without interest.

"Now it was clearly not the duty of the defendant to go on with the cultivation of the estate at his own risk, and the course he adopted of selling the estate was, if properly conducted, the right course to pursue if the defendant was aware at the time of the very depressed state of coffee speculations; indeed this is one of the reasons which he gives for pressing the sale; and by the terms of sale, the other proprietor was allowed to bid and actually did become the purchaser of the estate. The public, it was known, was not likely to bid up to the real value of the estate. It was therefore essential to the protection of the interests of the minors that the court should have had some notice of the sale, so as to

appoint a guardian over them, with power to raise money, if procurable, and to bid in their name and to prevent the estate from being sacrificed. As it is, the administrators, having incurred an expense of £183 in the cultivation of the estate, put it up for sale without any such obvious precaution to prevent a sacrifice, and allowed nine months credit without interest ; and the estate has been sold to the co-proprietor for £2,110, that is, for £1,055 for the half share deducting discount at 9 per cent for nine months reduces this sum to £988. 5, and deducting from that the £183 spent on the cultivation without any return, and we have £805 as the price of half an estate of 400 acres, of which at least 166 are said to have been in bearing. Now this same estate was sold in December 1851 by Mr. J. Staples immediately after crop with 80 additional acres of young coffee for £4,000 ; allowing £1,000 as the cost of the young coffee, £1,500 would have been the price for half the estate as it was in January 1849, shewing a loss of £695 on the sale.

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"If indeed the estate could have been held on for some years, it might have given a large profit, as it realized only 9 years afterwards £12,000. But the court holds that the plaintiffs have established the allegations contained in their libel, to the effect that the 1st defendant was guilty of a breach of trust in selling the estate during the minority of the heirs without leave of court, and is liable to pay the loss so incurred, which the cost estimated at £695 with interest from the 28th July 1849 until payment in full at 9 per cent.

"The next charge is that the administrator and administratrix allowed a house in Cross street, Kandy, to be sold in December 1853, on a judgment debt of a simple contract creditor, when they were in possession of funds to pay off the debt : that this sale was illegal, because made to the proctor of the administrator and administratrix ; and that the administratrix who received the purchase money has never accounted for it. In the present condition of the accounts, it is impossible to say whether the administrator and administratrix had money in their hands or not ; but the court holds that the objection on the ground of the purchase having been made by the solicitor of the administrators is groundless, inasmuch as the sale was not made by them, but by the fiscal ; and they had no power to prevent any person that pleased from bidding at the sale. It appears however that the balance sum of £60 has not been accounted for ; and the 2nd and 3rd defendants must be charged with this sum and interest from the date of the sale, the amount having been received by the administratrix. She must also account for a sum of £101, being price of two lots Nos, 35 and 36 near the Kandy lake sold to Dr, Pieris, the amount

1867. July 17. — of which has never been brought to account. The administrator himself purchased two other lots near the Kandy lake, which he still possesses. This purchase, the court holds, is altogether illegal; and it is admitted by the defendant's counsel that it is illegal by the law of England relating to administrators; but it is contended that by the law of Holland, a tutor may purchase the property of his ward under certain circumstances, as where there are two such tutors and only one purchases, and where the sale is by public auction, both which circumstances concur in the present case. But without looking into the law of Holland on this subject, the court holds that the office of administrator having been borrowed from the law of England, the powers and privileges attaching to it and the limitations to which they are subject must be determined by the law of England alone. Evidence has been called from all quarters of the island to prove that it has been the custom for administrators to purchase the property of their intestates, but the custom is a bad custom and against law, equity and common sense. To allow an administrator to purchase is to give him an interest in opposition to his duty. His duty is to sell his intestate's property for the best price that it will fetch; if allowed to purchase, his interest is that it should go cheap; and it appears that though administrators frequently purchase their intestates' property for themselves, they always do it through a third party, whose name is returned to the court; and this concealment has been carefully kept up in the present instance: the name of Mr. Edema having been returned as the purchaser without any reference to the 1st defendant. The 1st defendant must therefore be decreed to reconvey to the heirs the property so purchased by him.

"Another ground of complaint relates to the sale of the house in Colombo street, Kandy &c."*

On appeal, *Morgan Q. A.*, (with him *Dias*) appeared for defendants appellants.

Cayley and *Ferdinands* for plaintiffs respondents.

The following is the judgment of the Supreme Court:—

In this case we fully agree with the opinion expressed by the learned district judge, that there is no ground for believing the present appellant, the late administrator of the estate of Mr. de Saram, to have been guilty of fraud or peculation, or of any deliberate dishonest design for benefitting himself, or others, at the expense of the children of the deceased. But we also fully agree with the learned district judge in holding that the administrator

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* The remainder of this judgment as also the decree, I regret, I cannot give, the case book having been mutilated.—Ed.

has acted with great and grievous negligence and want of consideration for the interests which he himself had caused to be committed to his charge. Immediately after the death of the intestate, he volunteered to become administrator, though neither relative nor creditor ; and he then stated that he did so 'with a view to secure the interests of the deceased.' It is painful to contrast the language of that application for administration in August, 1848, with the confessions of default and delay made (and properly made) in the present petition of appeal, and with the long chain of proofs of neglect of duty which appear on the record of the motions and orders of court made in the testamentary case,—a record which extends over a period of nearly thirty years, until at last the court withdrew administration from those by whom it was so flagrantly and perseveringly misused.

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There has been, and there has rightly been, a general finding against the defendants, on the general charge of neglect of duty, though there has been no specific decree as to anything being paid or done by the defendants in respect of it. But we, on considering whether the judgment of the district court is or is not to be reversed or varied, are not bound to do more than to deal with those parts of the judgment against with the 1st defendant has appealed. There is no other appeal before us.

The specific matters as to which the learned district judge has ordered compensation to be made, and which this appeal complains of, are, strictly speaking, eight in number, but they may be conveniently classified under three heads ; for the last six are essentially of the same nature; whereas the first and second are of a wholly distinct character.

The first is a charge of devastavit in the improper sale of a share in a coffee estate called Hantalle.

The second is that the administrator (the present appellant) improperly became himself the purchaser of certain lots of building ground.

The third class of charges require the defendants to make good certain sums of money for which they have failed to account.

We will take these charges in the same order, and begin with that relating to the Hantalle estate.

The deceased was half owner of a coffee estate called Hantalle. The deceased's brother, Mr. John Staples, was the owner of the other moiety. About a year after the deceased's death, this estate was put up for sale by the administratrix and Mr. John Staples, and it was sold for £2,110, of which one-half, *i.e.*, £1,055, was due to the administrator and admistratratrix as representatives of the intestate.

1867. July 17. The defendants were charged by the plaintiffs with not having properly advertised the sale, but that charge (which was caused by a blunder in one of the defendants' accounts) is rightly considered by the district judge not to be well founded.

The district judge himself censures the defendants for not having applied to the court to appoint a guardian to act in behalf of the children as to mortgaging or selling this Hantalle property. But we think that the arguments urged in the petition of appeal and by the appellant's counsel at the hearing on this point, are very weighty. It seems to us that the course indicated by the learned district judge would have been strange and unprecedented, and it could not have been thought necessary on the hypothesis that the administrator and administratrix (who were themselves by their very office bound to guard the children's interests) had made up their minds to sacrifice those interests, and ought therefore to have got some one appointed to watch their own conduct.

Notwithstanding the high respect which we pay to the opinion of the learned district judge of the Colombo court on matters of this nature, we cannot agree with him on this occasion.

It remains then to see whether the defendants committed a devastavit in selling this Hantalle property, either by a flagrantly injurious sale, when no sale was necessary, or by grossly misconducting the sale, so that a fair price was not obtained.

The death of the intestate, and the sale of the Hantalle property, were both in the time of the well known coffee panic, which operated so disastrously on those who owned coffee estates, or were in any way interested in the coffee planting speculations in this island during the year 1847, and several following years. The depressed state of property of this description at the time of the intestate's death, and of the sale, is explicitly and emphatically evidenced by the appraisement in this very case. At the foot of the inventory made on the 29th of May, 1848, is an entry respecting this very Hantalle property, in which the appraisers say, "With "reference to the coffee plantation or estate called Hantalle, the "appraisers have determined to put a nominal value only, as all "property of this kind is at present unsaleable, and cannot be con- "sidered or valued as a marketable commodity. We wish it to be "understood that this is not in consequence of any failure or de- "clension of any part of the estate, but purely from general "depression and scarcity of money ; and we further say, that how- "ever valuable this property may be, it will be impossible to "realize at present, unless at a great sacrifice. We therefore say "one thousand pounds."

Mr. Brown's evidence in the present case, as well as that given by the defendant himself, show the extent and the continu-

ance of this depression. Now this Hantalle property was not only property of little available value at that time, but it was property of such a kind that it required a continual outlay for its upkeep, and for its preservation from falling into absolute worthlessness.

The agent who had supplied advances was refusing further supplies, and the part owner, Mr. John Staples, was insisting on the administrator and administratrix paying their fair share of expenses ; and he was urging them to concur in a sale. His letter of March 15, 1849, is a very important document in the case. Without going into detailed figures, we may safely state that through the paucity of assets in the defendants' hands, and the need of providing for the children's maintenance, and of keeping down the interest on encumberances on the house property, it was impossible for them to find the funds for keeping up and working the Hantalle coffee estate, unless they sold off the houses. A letter of 18th March 1849, proves that this plan was discussed, but that the administrator thought it unwise to sacrifice the house property for the sake of keeping up the coffee estate, which last he regarded as a mere speculation. We, who now look back on this with the knowledge of what has occurred in the interval, can see that it would have answered well if the coffee estates had been kept up even at the cost of alienating some of the houses ; but the question is, 'What means for forming a judgment did the administrator possess at the time ?' He may have not unreasonably thought it probable that coffee estate property, instead of reviving and increasing in value, would probably get worse and worse, and that the expense of its up-keep would swallow up the funds to be realized by the sale of the other property ; so that the result of such a proceeding would be to leave the orphans stript of the house property, and mere pauperized owners of a number of unprofitable and unsaleable acres.

But the conduct of the administrators is objected to because they sold under a condition which allowed the purchaser nine months credit without interest. Such a condition is certainly strange, and requires explanation. The explanation seems to us to be given by reference to the state of the money market at this time as to such property. We think there is truth in the argument that unless bidders had been tempted by such a condition, there would have been no chance of effecting a sale at all. It is to be observed that the sale was in July. Mr. Brown's evidence proves that the usual seasons for gathering the crop extends from October to January. A buyer might naturally be induced to come forward, if he found that he would not have to pay until the time came by which he might hope to have realized the money-value of the crop, of which he could already see the promise on the trees. The

1867. July 17. question first occurs, why could not the administrators wait to realize this crop themselves? The answer is that they were under immediate and constant pressure for finding money for expenses, and that several months of very great expense were yet to come before the promised crop could be picked, pulped, and carted to Colombo, where cash might be obtained for it in the ordinary way of business. And after all it was mere matter of speculation how far the then promising crops might fail, and how far the price obtainable for coffee might not sink lower and lower between July, the time of sale, and the time when the crop was to become an available commodity in the market. By selling and placing the purchaser in immediate possession, the administrators at once relieved the intestate's estate from the need of raising any more funds for Hantalle expenses; and they put an end to what they considered to be a state of undesirable speculation.

Having regard to these circumstances, we do not think that the price obtained at the sale was grossly inadequate, if indeed it was at all inadequate, to the fair value. The fact that the purchaser resold in 1851 at an advanced price is little proof against the defendants, when the fluctuating nature of the value of coffee estates is remembered. An ingenious argument was framed as to the matter, on the part of the respondents, from Mr. Brown's answer as to the yield per acre, and the price of coffee in that year. But this is met by the remarks already made as to the expenses to be incurred between the time of the sale and crop time, and as to the uncertainty which must have existed in July, 1849, as to the crop itself, and as to how far prices might fall before the crop could be turned into cash. No witness has been called for the plaintiff to prove that the price obtained at the sale was inadequate. Yet there must be many experienced planters still in the island who remember well the season and the prices of 1849, and who were well acquainted with this Hantalle property. The defendants have given evidence on this head. Their witness, Mr. Brown, gives important testimony to show that the price obtained at the sale was about the fair value. Altogether, on this part of the case, we think that the defendants acted as to the disposal of the Hantalle estate, not only honestly, but with reasonable care and sound discretion.

We must, therefore, overrule the part of the district judge's judgment which is adverse to the defendant as to this matter.

The next charge relates to certain lots of building ground, which had belonged to the intestate, and which the administrator, by the interposition of a fictitious purchaser, Mr. Edema, himself purchased from the intestate's estate, and still possesses. The district judge held that this purchase was illegal, and that the law

of England, which forbids such purchases, is to be followed, and not the Roman-Dutch law, by which it is said that such purchases would, in certain peculiar cases, be allowed. 1867. July 17.

We quite agree with the district judge on this subject, and we adopt, without repeating his observations as to the impolicy of allowing such purchases, and as to the system of concealment practised by interposing a fictitious purchaser.

We think it right, however, to add some remarks of our own as to our law of executors and administrators being entirely a graft of English law, and not a mixture of the old laws of Holland and those of England. We take it that the Charter of 1801 introduced the English law on the subject here as to Europeans other than the Dutch inhabitants. Executors and administrators were to be appointed with respect to such Europeans' estates, and the testamentary law was to be followed, as is prescribed in the Diocese of London, in England. The same Charter provided that the Dutch inhabitants should, in such matters, retain their old laws and usages.

Then came, in 1833, the Royal Charter, which is still in force, and which, by its 27th clause, empowers the district courts generally to appoint administrators to the estates of intestates, to grant probates to executors, and to exercise other powers in matters connected with such officers. This last-mentioned charter is not, in this respect, limited to any class of persons here; but it applies to the estates of all and any persons dying within any of the respective districts of the district courts of the island. We think that these charters introduced—the first as to one class of our population, the last as to the whole population of the island—an entirely new law, and one that could never be blended, or co-exist, with the old Roman-Dutch law, which dealt with heirs *ex testamento* and heirs *sine testamento*. This old system was, in our opinion, entirely abrogated, as being quite incompatible with the English which was ordained.

There was no such office as that of administrator under Roman-Dutch law.

In cases of intestacy, the heir by descent (or heir appointed by law, *heres legitimus*, as he was sometimes called) came in as heir; and proceeded to 'adiate' purely, or under benefit of inventory, or to take out the act of deliberation, just as the heir nominated by will. All this has ceased to exist, and the English forms and practices as to administrators are copied. So as to executors. Such an office was not wholly unknown to the Roman-Dutch law in its later times; but the Roman-Dutch executor was a very different functionary from the one who bears that name under the English system. He was little more than the agent of the heir

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appointed by the will. He could not alienate or sell without the heir's consent, and if the heir would not accept the inheritance the executorship became a nullity.

It has been said that the English law as to executors and administrators could not be fully adopted here, on account of the peculiar distinctions which the English law makes as to real and personal property.

But that has never been found to cause any difficulty or inconvenience. We recognize the same power of executors and administrators over land and other immovable property here which the English law gives them over chattels real : and thus an entire estate, landed as well as personal, is administered. Two cases have been referred to, which occurred in British Guiana, in which the Privy Council is supposed to have recognized certain rules of the old Roman-Dutch law as still prevailing in Guiana in testamentary matters. But this is no authority for Ceylon cases, inasmuch as the English law of executors and administrators has never been authoritatively established by Royal Charter in Guiana. This may be gathered from Mr. Herbert's book, called the *Dutch Executor's Guide,* from which many of our preceding remarks on the functions of Roman-Dutch heirs have been taken.

With regard to the point immediately before us, the setting aside a purchase from the estate by an executor or administrator, we follow unhesitatingly the English rule, and say, in the words of Lord Eldon : 'One of the most firmly established rules is, that persons dealing as trustees and executors must put their own interest entirely out of the question : and it is so difficult to do this in a transaction in which they are dealing themselves, that the court will not inquire whether it has been done or not, but at once says that such a transaction cannot stand.' (See the note to *Mr. Justice Williams*' book on Executors, p. 1,669 of the edition of 1856.)

We are told that it is a common practice in Ceylon for executors and administrators to buy of the estates, that is, to sell to themselves. Being a bad practice, it ought to be all the more promptly and strictly checked if it has become common. We are not much impressed by what has been said as to the extensive inconvenience which will be caused if such sales are set aside. This court would follow the practice of English Courts of Equity in such matters, and reject stale applications when there has been long acquiescence in the state of things at last complained of, especially if the interests of *bonâ fide* mesne purchasers would be affected by the court's interference. But in the present case, though there has been long lapse of time, there has been neither acquiescence nor laches.

We think it, moreover, right to say that, even if this matter is to be determined by Roman-Dutch law and not by English law, we are not satisfied that the purchase could be held good. We do not feel it necessary to go through Dutch authorities in detail. Most of the will be found referred to by Burge in the pages 463, 464, 465, of his second volume. The general rule that a guardian, or other person holding a similar fiduciary office, cannot purchase part of the ward's estate is broadly and clearly laid down; but two exceptions are indicated. One is where the guardians purchase *palam et bonâ fide* at public sale byauction. This exception is, we think, only applicable to such sales by auction as are caused by the action of a hostile creditor, and not to a sale by auction which is instituted and directed by the guardian himself. The other exception is when a guardian purchases from his co-guardian. 1867. July 17.

Admitting that the spirit of this exception might be satisfied if the co-administrator took an active and principal part in the direction of the sale, and evidently had exercised an independent and careful judgment as to the purchase by the other administrator being for the good of the estate, we think that nothing of the kind has been proved to have been done here. All the evidence we have is that of the first defendant himself, who says that the administratrix knew of the purchase by him. It is consistent with that evidence that the purchase may have come to her knowledge after it happened; and it is to be remembered that she would not be apprised of it by the conveyance, as that must have been, not to the defendant, but to the nominal purchaser, Mr. Edema. Indeed, the employment of this fictitious purchaser seems to us to be, of itself, fatal to the validity of the defendant's purchase under Roman-Dutch law, which most emphatically requires that a purchase by a guardian should be made *palam et bonâ fide* by the guardian himself, and not *per impositam personam.* (See *Burge*, p. 464.)

But while we adjudicate that these purchases are to be set aside, we think it, on the other hand, reasonable that the defendant should have back his purchase-money. Indeed, on this being pointed out, it was assented to on the part of the plaintiffs. The purchase-money is to be repaid without interest, and the plaintiff, on the other hand, is to make no claim for mesne profits of the land."

1867. Sept. 11.

September, 4th.

Present :—TEMPLE, J.

C. R. Panedura, No. 6,301. } *Pieris* v. *Pieris.*

Power of court to appoint *curator ad litem.*

The judgment of nonsuit was set aside and case remanded in these terms by the Supreme Court :—

The plaintiff was appointed on 7th June 1865 by the then commissioner *curator ad litem,* to sue on behalf of minors. On the 9th July 1867, that order was set aside by his successor on the ground that the Court of Requests had no power to appoint a *curator ad litem,* and the plaintiff was nonsuited, against which he appeals.

The Supreme Court thinks the commissioner was wrong in nonsuiting plaintiff, and that the Court of Requests has power to appoint a *curator ad litem.* A court, which has power to entertain an infants' suit, has power to appoint a person to represent that infant, without which the suit could not be entertained.

September, 11th.

Present :—TEMPLE, J.

C. R. Matale, No. 20,036. } *Cornalie* v. *Ukkua.*

Appeal—duty of appellant to furnish stamp for judgment of S. C.—within what period.

The appeal of the defendant was rejected in these terms :—

In this case the judgment was given on 6th May 1867 and the petition of appeal filed on the 8th May, the security bond also appearing to have been given in due time, but the case was not forwarded to the Supreme Court (as stated by the commissioner), because the appellant did not furnish the stamp for the judgment of the Supreme Court till 26th July 1867, whereby the defendant (appellant) has been enabled to keep the plaintiff from deriving the benefit of the judgment. The stamp Ordinance No. 11 of 1861 in the schedule for Courts of Requests requires the appellant (in appeal to the Supreme Court) to furnish to the clerk of the court the proper stamp for the decree or order of the Supreme Court. This stamp must be given within the time limited by the rules for perfecting the appeal, to prevent injustice to the respondent by being kept out of his judgment.

C. R. Panedura, No. 8,201. } *Fernando* v. *Fernando.* 1867. Sept. 27.

Intestacy—succession—law of North Holland.

On appeal by plaintiff, *Lorenz* appeared for him, and *Alwis* for defendant respondent.

The Supreme Court affirmed the decree of the court below, "but not for the reasons given by the commissioner. The law of North Holland prevails in Ceylon, and not the law of South Holland; and by the former, Bastian was the heir to his son Hendrick and Bastian being dead his heirs are entitled to the land. See *Van Leeuwen* p. 293, 298; *Vander Linden* i. sec. 2 ch. 3; *Grotius* p. 186; *Vander Keessel* 113."

September, 27th.

Present:—Creasy, C. J., and Stewart, J.

D. C. Galle, No. 1,012. } *In re Ana de Silva*, deceased.

Administration—contest for—surviving executor.

This was an application for administration *de bonis non.* Weerasekera and Perera opposed it, the district judge committing the letters to Perera. Weerasekera, who was the surviving executor of the testatrix, appealed.

Dias for appellant.

The order of the court below was set aside and probate granted to appellant, in these terms:—

Even supposing that the applicant had formally renounced his appointment of executor, he is not precluded from acting, on the death of the co-executor, who proved the will. "Upon the death of him who proved, no interest is transmitted to his executor, if any of those who refused be surviving." *Williams* on *Executors,* 3rd edition i. p. 185.

1867. Oct. 4.
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October, 4th

Present :—CREASY, C. J., and STEWART, J.

D. C. Colombo, No. 42,709. } *Sobitta Terunanse* v. *Siddatte Terunanse.*

Buddhistic law—succession.

The following judgment of the district judge set out the facts of the case :—

"A priest called Kolemedreya Unanse died possessed of a certain temple and lands at Tumbowille in the Salpitty Corle, and without leaving pupils of his own. It is admitted that in such a case the pupils, direct or more remote, of the tutor of the deceased priest would be entitled to succeed to his property, and that he would have no power to leave it either by deed or otherwise to a stranger, although he might appoint one out of several pupils to the management of the wihare.

"The defendant alleges that the deceased priest was a pupil of one Bentota Unanse, who left a pupil, who was his own tutor.

"The plaintiff admits that Kolemedreya was at one time a pupil of Bentota Unanse, but alleges that he afterwards threw off his robes, and after remaining for some years as a layman was re-ordained at the Asgeria Wihare in Kandy as the pupil of Gangoddawelle Unanse, and that this Gangoddawelle Unanse had a pupil called Upananda Unanse, who had a pupil of Dickwelle Unanse, who had a pupil, the plaintiff.

"The defendant admits that if a priest becomes a layman, he loses all connexion with his tutor, and, if re-ordained, becomes to all intents and purposes the pupil of the new tutor, in whose name he is presented for re-ordination, and that the pupils of the latter, and not those of the former, are entitled to succeed him if he leaves no pupils of his own, but he denies that Kolemedreya Unanse ever did become a layman.

"The questions therefore for the cousideration of the court are—(1) whether Kolemedreya ever threw off the robes, and (2) whether he was re-ordained as the pupil of Gangoddawelle Unanse.

"With reference to the first point, we have the evidence of a priest who was present at the re-ordination of Kolemedreya, and that of another who knew him first as a priest, then as a layman, and then as a priest; and we have a distinct admission by the defendant himself that he was robed a second time. And on the second point, we have the evidence of the plaintiffs' witnesses that he was ordained as a pupil of Gangoddawelle; we have no other person suggested as his second tutor; and we find that in 1853, he executed a deed in favour of Dickwelle Unanse, which would

have been absolutely void, if Dickwelle Unanse had not been one of his fellow pupils. The court therefore is of opinion that the plaintiff has established his right. Judgment for plaintiff as prayed." (Lawson, D. J.) 1867. Oct. 8.

On appeal *Morgan Q. A.* (with him *Lorenz* and *Alwis*) for defendant appellant, *Dias* and *Ferdinands* for respondent.

The following is the judgment of the Supreme Court :—

This is a case of considerable difficulty, but the Supreme Court thinks on the whole that the plaintiff has failed to make out his title.

He was bound to prove not only that there was a re-robing and a new pupilage, but also that the re-robing (and the temporary descent from the priestly degree which make a re-robing necessary) occurred before the grant of the land in 1833. If they were subsequent to that grant, then the priest by the abandonment of his priestly character forfeited his rights as priest to the land in question.

The balance of evidence seems to the Supreme Court to prove that the temporary abandonment of priestly degree, and that the consequent re-robing, were after the grant in 1833.

The priest may perhaps be considered to have gained a prescriptive title by his long holding after the forfeitures. If so, the deed to the defendant in 1861 would, if duly proved, be operative.

The deed to Dickwelle became inoperative on Dickwelle's death, and the full property then revested in the donor.

The point about the materiality of the precise date of the re-robing ought to have been more fully and explicitly taken on the pleadings and at the trial.

The decree of the court below to be set aside and judgment of nonsuit to be entered.

October, 8th.

Present:—Creasy, C. J., and Stewart, J.

P. C. Matara, No. 54,374. } *Siman* v. *Jayasuria*, et. al.

On appeal against a conviction under clause 26 of Ordinance No. 10 of 1844, *Dias* appeared for appellant. Ordinance No. 10 of 1844, cl. 26 —"disposal of."

The Supreme Court set aside the conviction and sentence in these terms :—

The general word "dispose of" in the Ordinance is limited by

1867. Nov. 5.

the particular word which precedes. For a man to allow his servants to drink a dram of the arrack without payment, but merely as a matter of (probably imprudent) liberality, is no more punishable under the Ordinance than if he had taken a dram himself.

P. C. Jaffna, No. 14,019. } *Nagamuttu* v. *Vinasy.*

Assault—power of P. M. to dismiss trivial cases.

This case was remanded for further hearing as follows :—

If the police magistrate believes that an assault was committed without legal justification, he should give judgment that the defendant is guilty of assault.

No authority is given by our law to dismiss cases of assault, because the assault was slight. If the magistrate considers the case to be a frivolous one, he can mark his opinion of it, by imposing a merely nominal fine.

November, 5th.

D. C. Colombo, No. 45,376. } *Suppramanian Chetty* v. *Cappel,* et. al.

Special mortgagee—claim by creditor for upkeep of estate—preference.

This was an action brought by the mortgagee of a coffee estate, belonging to the late firm of Sinne Lebbe Brothers (insolvents), against the assignees (John Capper and E. Nannytamby) of that firm to obtain a sale of the land mortgaged.

The defendants admitted the liability of the land for the debt but claimed a priority in respect of sums expended by them for the upkeep of the estate whilst in their possession and under their management,—sums expended in terms of an order of the D. J. of Kandy in the insolvency case, to which however plaintiff was no party.

The district judge (Mr. Lawson) held the coffee estate executable, and rejected the defendants' claim of priority.

On appeal by defendants, *Lorenz* appeared for them, and *Cayley* for plaintiff respondent.

The following is the judgment of the Supreme Court :—

This case has come before us in a somewhat imperfect form as to facts. It appears however to us that the assignees have no hypothec for expenditure that can prevail over the prior special

hypothec possessed by the mortgagee. See the latter part of the judgment of this court in *Lee* v. *Sinnaya Chetty*, 14th August, 1862. 1867. Nov. 5.

The claim for commission is obviously untenable.

It is suggested that the plaintiff, since he has been in possession under the ineffectual sale in 1865 has made a great profit out of the estate. We affirm the decision of the district court in favour of the plaintiff, but with this addition : that the defendants (if they claim it) are entitled to have an account of the plaintiff's profits from the estate, and of his proper expenditure therein from 3rd May 1865 to the time when the proceeds of the sale, now demanded, are ready to be handed over to him. The balance, if any, of such profits over such expenditure is to be deducted from the amount paid to him for principal and interest on his bond. The costs of such account (if taken), are to be in the discretion of the district court judge.

November, 5th.

D. C. Matara, No. 19,100. } *M. L. Marikar* et. al. v. *Casy Lebbe* et. al.

Purchase from executor—order of court—entail under last will.

The following is the judgment of the Supreme Court :—

Set aside and judgment entered that plaintiffs do recover possession of the half of garden as claimed together with costs of suit. No damages.

The testamentary case has been produced before us on appeal, and it clearly shews that there was no necessity for the sale of this land, and that there was no order of the district court for the sale (as to this last see *Marshall* 191). Not that an order of the district court could legalize a sale which was in itself absolutely illegal ; but when we have to inquire whether a sale had become necessary, and therefore legal, the omission to obtain an order from the district court is very significant.

Voet 36 i, 27, and *Sir Chas. Marshall* p. 891 establish the sufficiency of this entail. The land is certainly in schedule B, and therefore within the entailing clause. A purchaser from an executor is affected with notice of the contents of the will. The minority of these plaintiffs prevented prescription from unning against them. As the eldest was only 16, when according to Moorish law he obtained majority, we do not think that five years delay before he applied to the court was such laches as to disentitle him to the help of the court.

1867. Nov. 7. — *November, 7th.*

Present :—CREASY, C. J., TEMPLE, J., and STEWART, J.

D. C. Colombo, No. 45,351. } *Wall & Co.* v. *Schraader.*

Sale of cinnamon crop—agreement for—"interest in land"—Ordinance No. 7 of 1840—damages—measure of—knowledge of defendant.

Defendant entered into an agreement with plaintiffs to deliver to them at certain specified rates all the crop of a certain year of two cinnamon estates. The defendant delivered a portion of the crop to plaintiffs, but failed as to the residue ; and plaintiffs sued for damages for this breach of contract and estimated their loss at the amount of the profit which they would have gained by sale of the cinnamon in the London market.

The defendant pleaded that the contract created an interest in land and should have been notarial ; and also that the principle on which plaintiffs calculated damages was wrong, and he contended that the amount of damages accruing to plaintiffs was the difference between the contract price and the market price in Colombo at the time when the breaches was committed.

The learned district judge, *Lawson*, gave judgment for plaintiffs, being of opinion that the contract created no interest in land, because it gave no right of entry to take the crop, and that both parties understood that the cinnamon was for exportation to England, and that therefore the plaintiffs were entitled to the profit which they would have made on the sale in London.

On appeal, *Dias* (with him *Cayley* and *Ferdinands*) for defendant appellant, *Lorenz* for respondent.

The following is the judgment of the Supreme Court :—

With regard to the objection that the contract purported to create an interest in land, and therefore required a notarial instrument, the English authorities on what is an interest in land, within the meaning of the 4th sec. of the English Statute of Frauds, are fully applicable here ; and the case of *Smith* v. *Surman*, 9 B. and C. p. 561 seems to be decisive of the case before us. In *Smith* v. *Surman*, the owner of the trees, growing on his land, agreed with the defendant, while they were standing, to sell him the timber at so much per foot. In the present case, the owner of the cinnamon estates agreed to sell the crops of the then growing cinnamon bark in them at specified prices per pound ; and the contract in the present case expressly purports to be one for the delivery of goods. In *Smith* v. *Surman*, the Court of King's Bench held that the contract was not one for an interest in land. The court relied on the fact that the sale was to be one of timber at so much a foot. Here the sale was to be one of bark at so much a pound to be

delivered as goods. Mr. Justice Littledale says : " the object of a party who sells timber is not to give the vendor any interest in his land, but to pass to him an interest in the trees, when they become goods and chattels." So here, the owner of the cinnamon estates clearly intended not to give the vendor any interest in his land, but to give him an interest in the bark when it had been gathered from the trees and had become goods and chattels. Indeed the present contract is in its very terms a contract for the delivery of the bark as goods. The case of *Smith* v. *Surman* is referred to by Lord Abinger in *Rodwell* v. *Phillips*, 9 M. and W. 501, which has been cited for the appellant, and in which it was held that a mere general agreement for the purchase of growing crops of fruit is a contract within the statute. Lord Abinger says of *Smith* v. *Surman* : " There is a case in which it appears that a contract to sell timber growing was held not to convey any interest in the land, but that was where the parties contracted to sell the timber at so much per foot, and from the nature of that contract, it must be taken to be the same as if the parties had contracted for the sale of timber already felled." So here, the contract is for the delivery of the bark as goods at so much a pound, and it must be taken to be the same as if the parties had contracted for the sale of bark already peeled.

Another case may be usefully referred to, as declaring a general principle by which many questions of this nature may be solved. It is the case of *Washbourne* v. *Burrows*, 1 Exchequer Reports 107; in the judgment given by Baron Rolfe in that case, it is stated : " when a sale of growing crops does, and when it does not, confer an interest in land, is often a question of much nicety; but certainly, when the owner of the soil sells what is growing on the land, whether natural produce as timber grass or apples, or fructus industriales as corn, pulse or the like, on the terms that he is to cut or sever them from the land and then deliver them to the purchaser, the purchaser acquires no interest in the soil, which in such case is only in the nature of a warehouse for what is to come to him merely as a personal chattel."

Now in the present case, it is clear that the vendor was to peel the bark and to deliver it as goods. The objection under the Ordinance against frauds is, in our judgment untenable.

With respect to the damages, we cannot see that the estimate of the district court judgment was erroneous. Both parties knew well at the time of the contract that the cinnamon was meant for sale in the London market, and the principle laid down in *Hadley* v. *Baxendale*, 9 Excheq. 341, seems fully to apply here. The authority also of *Bridge* v. *Wain*, 1 Starkie 505, is very strong in favour of the present plaintiff.

Affirmed.

1867. Nov. 28.

November, 28th.

Present :—CREASY, C. J., TEMPLE, J., and STEWART, J.

D. C. Colombo, No. 44,962. } *Caitino* v. *Cooray.*

Ejectment dispossessed —occupier— claim for compensation.

This was an action to recover possession of a certain land and house situated thereon. Plaintiff alleged that one Candappa had by his last will bequeathed the land in question to the Church of St. Philip Neri, that the executors of the testator had passed a conveyance in favour of the church, but that defendant had taken forcible possession of the house standing on the land.

Defendant pleaded that the portion of the land on which the house stood belonged to his father, that his father possessed the land for over ten years, that after his death, he himself possessed and improved the land and had built a house thereon. He prayed that plaintiff's claim may be dismissed.

The district judge found that the house which defendant had built was built on Candappa's land and gave judgment for plaintiff.

On appeal by the defendant, *Morgan Q. A.* (with him *Dias* and *Lorenz*) appeared for him; and *Cayley* for respondent.

Defendant (in his appeal petition) claimed for compensation, in the event of the Supreme Court upholding the finding of the district judge.

The Supreme Court affirmed the finding, but modified the decree by requiring plaintiff, on being put into possession, to pay defendant £130 as compensation for the buildings. The following is the judgment :—

We think, especially for the reasons in para 2 of the district judge's judgment, that the plaintiff is entitled to recover. The question remains whether the defendant ought not to have compensation for the house. Strong proof of notice not to build, given by a person having competent authority, ought to be produced, before a dispossessed occupier is denied compensation for his building. We do not think the proof given in this respect on the part of the plaintiff sufficient. On the other hand, we do not accept the value put by the defendant on his buildings. He has called no evidence to support his estimate, and we give him the largest sum mentioned on the other side.

D. O. Kandy, No. 41.609. } *Tytler* v. *The Provincial Road Committee for the Central Province.* 1867. Nov. 28.

Ordinance No. 10 of 1861—Provincial Road Committee—action against, for excessive assessment—absence of malice and mala fides.

Cayley for defendants appellants, and *Lorenz* (with him *Van Langenberg*) for plaintiff respondent.

The decree of the court below was reversed by the Supreme Court in the following judgment :—

In this case, the plaintiff, who is the proprietor of certain lands in the Kalibokke district in the Central Province sues the defendants, as Provincial Road Committee of that province, for having assessed him in respect of the said land at an excessive amount for the formation of a certain new road.

The Supreme Court is of opinion that the plaintiff is not entitled to recover. No malice or mala fides is imputed to the defendants, and it appears that, in assessing the various amounts on the proprietors of the several estates in the district, they acted honestly and to the best of their judgment and ability.

The members of this board serve this office compulsorily (see § 21 of Ordinance No. 10 of 1861). They receive no pay or emoluments for their service, and, as a body, they have no funds, but pay into the colonial treasury all monies that come into their hands. They have power to sue rated proprietors who refuse or neglect to pay their assessment. No suit was brought by them to recover this assessment from the plaintiff. He, by his agent, paid it under protest; and the Provincial Road Committee in due course paid it over into the colonial treasury.

We think it unnecessary to decide whether the assessment on the plaintiff was or was not excessive under the 3rd clause of the Ordinance No. 11 of 1858, which directs the assessment on each estate to be made "by dividing the sum of money equal to a moiety of the total cost of constructing each section of the proposed road by the total number of acres of the estate interested in and capable of using each such section." The questions how much of an estate is interested in a particular new road, and in what sections of the road various portions of the estate are interested, must generally be matter of opinion, and there is conflicting evidence in the present case; but we are satisfied that the defendants enquired into and considered the subject carefully, and to the best of their ability, and that they formed their opinions and exercised their discretion honestly. If they nevertheless came to an erroneous estimate and put down the plaintiffs estate at too high an assessment—(and whether it was too high we do not decide one way or the other)—they did not, in our opinion, thereby make themselves liable to the defendant in this action. Judgment of nonsuit to be entered, with costs for defendant.

1867.
Nov. 29.

November, 29th.

Present :—CREASY, C. J., TEMPLE, J., and STEWART, J.

P. C. Colombo, No. 100,361. } *Ferguson* v. *Olivera.*

Labor Ordinance—interpretation—cl. 11—"other like" servant—kankani,—pioneers.

This was a charge under the Labor Ordinance. On defendant being acquitted, the complainant appealed. The Supreme Court set aside the order of acquittal, in the following judgment :—

The Supreme Court thinks that this defendant comes within the 11th cl. of Ordinance No. 11 of 1865 as read together with the interpretation clause.

The interpretation clause is worded in such a manner that we cannot apply to it the ordinary rule of making the special words at the commencement control all the general words that follow. Neither a pioneer, nor a kankani is an "other like" servant. Yet both pioneers and kankanies are clearly included. The true meaning seems to us to be that it includes all menial and domestic servants, and also all out-door labourers, whether employed in a private family or in agriculture, or on road, railway or other like work. It also includes pioneers and kankanies, and persons in employment similar to the employment of pioneers or of kankanies.

The present defendant seems to us to be in employment similar to that of a kankani. He is not a superintendent of work, in a position far superior to that of the labourers; but, he is, like a kankani, bound to accompany labourers, and to set them to work, and to exact their full amount of labour, and to direct the manner in which they perform their labour. Though not actually doing manual labour himself, he is closely connected with those who do, and approaches nearer to them than to his superior masters, as to position. The Supreme Court thinks therefore that he is such a kankani as is described to be in the Supreme Court judgment. P. C. Badulla 9,416, April 4th, 1865.

Case remanded for the magistrate to consider and adjudicate the sentence.

November, 29th.

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D. C. Kandy, No. 44,750. } *Tottenham* v. *Marshall.*

Sale of land—conditions of sale—misdescription—puffs—liability of vendor—duty of vendee.

Defendant appealed against the decree of the court below.

Lorenz for him; *Morgan Q. A.* (with him *Ferdinands* and *Cayley*) for respondent.

The following is the judgment of the Supreme Court :—

The plaintiff in this action sought to enforce payment of a balance due of the purchase money of certain forest land sold by him to the defendant.

The plaintiff sets out in his libel that the agreement was to purchase according to certain conditions of sale, a copy of which is annexed to the libel.

The defendant in his answer admits that his agreement was to purchase according to those conditions; but he asserts that he was deceived and misled into making the agreement by the false and fraudulent misrepresentations of the plaintiff as to the quantity of the land, and as to its being well-watered, and as to the whole of it being capable of being planted with coffee.

The land in question was put up for sale, but not sold, by Mr. Archbald the auctioneer, on the 25th of May 1865. The defendant does not appear to have been present on this occasion. But on the same day (see letter X) he agreed with the plaintiff to buy the land, called lot 523, for £1,300, according to the condition of sale drawn up by the auctioneer; and he then paid £200 as a first instalment. He afterwards paid other instalments; but, in December, when a further payment became due, he wished the plaintiff to take his bill instead of cash. This the plaintiff refused to do, (see letter of December 14th) and then, and not before then, the defendant appears to have begun making complaints that he had been deceived in the purchase. His primary complaint, and almost his only seriou scomplaint before the case came on in appeal, was that the plaintiff had deceived him by making him believe that a particular lot of land of between 10 and 11 acres, which appears at the top of the tracing S, as lot 13, was included in his purchase. And he specially stated in his evidence that the plaintiff had handed to him a rough plan (marked Y) as the plan of the land, which was the subject of the purchase. He produced the rough plan at the trial, having on it at the back a memorandum written by him the defendant, and purporting to have been made the very day of the purchase, and which says that this plan was given to the defendant by the plaintiff. Now, it has been proved to abso-

1867. Nov. 29. lute certainty, (see particularly Mr. Archbald's residence) that the whole of these assertions of the defendant about this rough plan Y, are entirely untrue. This part of the defence was given up on the hearing of the appeal, and not a single argument against the plaintiff's claim was advanced before us on the score of misdescription of quantity. But we cannot lose sight of the fact that such a defence was concocted, and was relied on at the trial, as the main defence to the action. The defendant who charges the plaintiff with fraud and falsehood, has himself acted in such a manner as to deprive his testimony of all value as to all parts of the case, and, we believe, that the statements of the plaintiff as to the whole transaction are substantially accurate.

The Supreme Court is now asked to decide against the plaintiff, on the ground that he deceived the defendant by falsely representing that the estate was "well watered, and all of it capable of being planted with coffee." The defendant says that it is not well-watered; but it is clear from all the evidence, and from the plans, that it has some supplies of water, though its occupier cannot command so ample a supply as would be at his disposal if he were also the occupier of lot 13. As to the lands capability of being planted with coffee, the defendant, (who has been in possession ever since the agreement) has in fact planted a considerable portion with coffee, and has gone on planting even after his alleged discovery of there being a great quantity of rock on the land. His surveyor, Mr. Robertson, gives evidence that the quantity of land thus covered with rock, so as to be unsuited for planting, amounts to 30 acres, out of 149. He says—"that there are always, or very frequently, quantities of rock in blocks sold to the planters by the Crown;" [it is to be observed that the plaintiff had purchased this land from the Crown.] The witness adds that—"the purchasers take the good and the bad without compensation." He adds that this case appeared to him to be beyond all ordinary cases of hardship in this respect. Another witness, Mr. Swan, who is an experienced planter, states. "It frequently happens that a person purchasing forest afterwards discovers that there is a good deal of rock in it unavailable for coffee cultivation." He mentions instances where so much as from 25 to 30 per cent was found to consist of unavailable rock,—and, he adds, "according to my experience it would be a most unheard of thing in coffee planting for a man to purchase forest for coffee planting, without either personally examining it himself, or getting some one else to do so for him."

Now let us see what, if any, representations were made by the plaintiff or his agents to the defendant about the state of land as

to water supply, and as to the soil being fitted for coffee planting. 1867. Nov. 29.

The particulars and conditions of sale say nothing about it. The copy that was executed by the defendant is lost. The copy put in evidence has a number of blanks which must have been filled up in the signed copy as to amount, and time of payment, and other matters; but there is no reason to suppose, nor is it suggested by the defendant himself, that any written eulogy of the quality of the lot was introduced in the signed copy.

But the printed condition do contain a clause that "if any errors or mis-statements shall have been made in the description of the property, the same shall not vitiate the sale." Of course such a clause would not protect the vendor, if he had practised a deliberate fraud, nor even if, with actual moral fraud, he had seriously mis-described the property. But such a clause is not wholly inoperative. It is a fair warning that the vendor does not bind himself to perfect accuracy of description, and that if the purchaser wants accurate knowledge, he had better acquire it by looking before he bids.

In the present case the conditions contained this warning. They said nothing about the watering or about the soil of the estate; but the advertisement which was inserted in the newspaper about it said, among other praises of the estate, that it was well-watered, and all of it capable of being planted with coffee.

We very much question the defendant's right to rely on this advertisement against the plaintiff. We think that expressions like this, in an advertisement, are looked on in business as mere puffs, and not as warranties, which are binding on the owners of the advertised property: expressions as strong or stronger than these have been treated as of no weight, even when inserted in the conditions of sale. Thus in *Scot* v. *Hansom*, 1 Sim. 13, a description that the land was uncommonly rich with water meadow, was held to be immaterial, although the property was imperfectly watered. In *Magenis* v. *Fellon* (cited in Lord St. Leonards on Vendors and Purchasers, p. 479), a representation that a house was fit for the residence of a respectable family was treated as immaterial and mere puff. The court said that the purchaser might have seen the house and judged for himself.

We believe that what passed between the plaintiff and the defendant on the subject before the purchase was in substance as follows. The plaintiff told the defendant that he, the plaintiff, had never been on the land with the exception of surveying the southern boundary, and he said, that there was a stream on the northern and southern boundaries.

The Government plan shews that there are such streams.

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This is the plaintiff's testimony, which we believe. The defendant attributes to the plaintiff the use of stronger expressions about the water supply. But he at the same time makes assertions about the plan Y having been produced, which assertions, as we before remarked, have been completely disproved, and the utter erroneousness of these assertions invalidates the whole of his statement as to this conversation.

The defendant paid £200 at once and this payment was acknowledged by the plaintiff in letter X, already alluded to, in which the plaintiff tells the defendant that the sale is subject to the conditions of sale which had been read when the land was put up for sale, and which conditions the plaintiff by that letter requires the defendant to complete within 15 days. He adds "in the meantime we may consider this a *bonâ fide* sale." The defendant accordingly in about 15 days executed a copy of the conditions of sale at Mr. Archbald's. Nothing else material seems to have occurred then, except that Mr. Archbald handed to defendant the tracing S of which particular mention will be made presently.

It is to be added that the defendant at the time of this agreement was the superintendent of a coffee estate, only a few miles distant from the land in question. The defendant took immediate possession of the purchased land, paid some further instalments, and commenced cultivating and planting as has already been mentioned.

Now in all that has been set out, we discover, with the exception of what appeared in the advertisement, no representation at all by the plaintiff as to the quality of the soil of the estate, and only one statement about the water supply, which appears to be correct.

But it has been urged on us that the plaintiff made some fraudulent insertion in the tracing S, and that it is thereby precluded from recovering against the defendant. It is said that the plaintiff obtained tracing S from the Government, and that when he so obtained it, it did not contain the marks of rocks and the words "precipitous rocks" to the east of the land in question; and that the plaintiff fraudulently inserted these to make purchasers believe that there were no such rocks anywhere else. We can see no ground for supposing that they were inserted with any such view. There is no statement that this tracing was shewn to purchasers as being the identical tracing supplied by the Government to the plaintiff, or that it was any way used to mislead purchasers. The auctioneer's evidence is explicit that he gave to two or three gentlemen (of whom the defendant was not one) rough and not very accurate copies of this plan, not as describing the land, but to enable these intending purchasers to find out the land and go

and look at it and judge of it for themselves. It was one of these copies that the defendant afterwards got hold of, and of which he untruly and most improperly asserted that it was given to him by the plaintiff, and that it was used by the plaintiff to mislead him, the defendant, as to the quantity that he was purchasing. Moreover as to this particular tracing S, the defendant does not appear to have been present when the property was put up for sale by the auctioneer, or to have ever seen this tracing S before or at the time of his agreement with the plaintiff. He appears to have seen it for the first time when he signed the conditions of sale at Mr. Archbald's fifteen days after he had made his bargain with the plaintiff and paid his instalment of £200.

On the whole facts of the case, we find that no fraud or misrepresentation has been practised by the plaintiff on any one for whom he is responsible in this transaction with the defendant.

Affirmed.

December, 3rd.

Present :—Creasy, C. J., Temple, J., and Stewart, J.

D. C. Colombo, No. 45,999. } *Maitland & Co.* v. *Bastian.*

Shipping—damage to cargo—improper stowage—negligence of master.

This was an action brought to recover damages for injury done to a bale of corks shipped on board defendant's vessel, the *Banfield*, in London and consigned to plaintiff. The injury was alleged to be caused by the bale being stowed in such close proximity to some creosoted timber (railway sleepers) as to become impregnated with the fumes of the creosote.

Defendant denied the damage complained of and pleaded that the ship was a general ship and that he had a right to carry creosoted timber and was not responsible for the injury, if any was caused.

The bill of lading under which the consignment was shipped was in the usual form—"shipped in good order"—"weight and contents unknown"—"to be delivered in the like good order." The packages (one of which was the present bale of cork) were described by number and marks in the margin, but the contents were not stated.

1867. Dec. 6. — The learned district judge found that the bale in question was injured in the manner alleged, and that it was the duty of a master having on board creosoted timber, calculated to injure other goods in his vessel, to ascertain the contents of the packages shipped, or if unable to protect them, to refuse to carry them. "The present action is founded on the negligence of defendant in improperly stowing the corks where they were liable to injury and the court holds there is sufficient evidence of negligence and improper stowage. *Aston* v. *Herring*, 25 L. J. Excheq. 117." The district judge gave judgment for plaintiff for £70 and costs.

On appeal, *Morgan, Q. A.* for defendant appellant, *Lorenz* for respondent.

The Supreme Court affirmed the decree of the court below in the following judgment :—

Our only reason for pausing before we affirmed the judgment for the plaintiff in this case was the fact, which appears from the bill of lading, that the goods in question were shipped by the plaintiff's agents without any description of their nature or quality, and merely as packages the contents of which were unknown. It might be fairly argued that the master in such a case cannot be expected to take as much care not to stow the goods near dangerous neighbours as when he has warning of their nature. But the mischievous neighbours in this case, that is, the creosoted timber, were of such an extremely offensive and noxious nature, that almost every other kind of cargo was sure to be tainted and damaged by being stowed in any part of the same hold. The master who ships such notoriously and grossly injurious articles as creosoted timber ought to take care that he stows within the range of their mischievous influence nothing which he has not ascertained to be of such a kind that the tainting odour of creosate cannot injure it.

December, 6th.

Present :—Creasy, C. J., and Temple, J.

C. R. Galle, No. 33,592. } *Siman* v. *Elias*.

Cause of action—lease—

The Supreme Court set aside the decree of the court below and remanded the case, observing,—

If, as would appear from the attestations to the lease filed in

the case, the action is brought on a lease executed in Galle, the Galle court would have concurrent jurisdiction, although the land was in another district.

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situation of land—place of execution of lease.

C. R. Batticaloa, No. 17,000. } *Morris* v. *Armitage Brothers.*

Principal and agent—foreign principal—liability of agent.

On appeal by defendants, *Lorenz* appeared for them, and *Cayley* for plaintiff respondent.

The following is the judgment of the Supreme Court :—

One of the defences set up in this case is that the defendants are not liable on the contract to convey the goods in question from Colombo to Batticaloa, inasmuch as they made the contract as agents for the Bombay Steam Company, which appears on the face of the bill of lading.

The reply of the plaintiff to this has been that, although the defendants described themselves as agents, yet, inasmuch as they were acting for a foreign principal, they are liable to be sued themselves.

Authorities of considerable weight may be found in support of this proposition, viz. that although a party contract expressly as agent, but for a foreign principal, he is himself in law the principal. See *Addison on Contracts*, p. 1266 (3rd edition,) *Story on Agency* para 290 et seq; the dictum of Lord Tenterden in *Thomson* v. *Davenport*, 9 B. & C. 78; and the judgment of Eyre C. J. in *De Gaillon* v. *L'Aigle*, 1 Bos. and Pul. 368; but this, as a general doctrine has now for many years been called in question in both the English and American Courts, and must be now considered to a great extent over-ruled. The progress of judicial opinion as to agents and foreign principals may be found fully set out in Kent's *Comment*, vol. ii. p. 851 and notes; and in the note of p. 311, vol. ii. of Smith's *Leading cases*, 4th edition. The law on the subject may now be safely taken to be as stated by Mr. Justice Willes and Mr. Justice Keating in the last mentioned note to their edition of Smith, and in Mr. Justice Kent's note to his commentaries already referred to. We learn from them that, whether the principal be foreign or native, makes no difference in point of law to the agent's liability. In each case, the question with whom the contract was made is a question of fact; and the circumstance of the principal being a foreigner may often be one of the circumstances to be considered in determining the question of fact. Thus in *Wilson* v.

1867. Dec. 6. *Tululta*, 14 Q. B. 405, where the defendant signed the contract in England "in behalf of Don Parago of Havana," the fact of the principal being a foreigner was regarded as important in fixing the agent with liability, although he had signed as agent. In that case several things were to be done by the plaintiffs, and the plaintiffs were to receive certain payments and advances before they left the country where the agent signed the contract, and before they arrived at the residence of the foreign principal. The foreign pricipal was then to be at liberty to confirm or decline the contract. It was held that the contract must be regarded as the contract of the agent himself in respect of those matters which were to occur, before the foreign principal exercised his discretionary power as to confirming the contract. We mention this case particularly as it is sometimes cited (as in Addison) as an authority for the broad proposition that contracts made by an agent on behalf of a foreign principal are to be considered as the contract of the agent himself. The judges who decided *Wilson* v. *Tululta* expressly guarded themselves against being supposed to lay down such a general rule, On the other side there is among many others the very strong case of *Deslandes* v. *Gregory* decided againt the agent's liability by the Court of Queen's Bench, as reported in 29 L. J., Q. B. 93, and confirmed by the Court of Exchequer Chamber as reported in 30 L. J., Q. B. 36.

In the case before us not only do the defendants sign as agents, but the terms of the bill of lading shew that it was the liability of the Bombay company, and not the liability of the agents, which was pledged to the plaintiff. The bill of lading specifies that "the company are not responsible for leakages &c;" that the company will not be "liable for certain packages;" that certain things shall be done "at the company's expense;" and there are other phrases of the same kind.

We feel bound to admit the objection taken by the defendant as to their non-liability to be sued for the breach of contract in this case, and the plaintiff must be nonsuited. But we quite agree with the Court of Requests in thinking that there was a breach of contract, and inasmuch as nearly all the evidence in the case had reference to the question of breach of contract, the defendants ought not to receive any costs.

December, 17th.

1867. Dec. 17.

Present :—CREASY, C. J., and TEMPLE, J.

D. C. Colombo, No. 45,351. } *Wall & Co.* v. *Schraader.*

Action for damages—absence of prayer for interest—decree for damages only—power of district court to award interest on motion made in that behalf.

This case came up in appeal, as reported at p. 284 *ante*, on the merits, and the Supreme Court then affirmed the judgment of the court below.

Thereupon, as the decree of the court below had not awarded interest, plaintiff moved, in the court below, to recover interest on the judgment of the district court from the date of the judgment to 16th November 1867.

Defendant resisted the motion and now appealed against the order of the district judge allowing the motion.

Dias appeared for defendant appellant, *Lorenz* for respondent.

The order of the court below was set aside in the following judgment :—

The Supreme Court does not consider that the district court has the power to award interest upon the damages recovered from the date of the judgment given by the district court, and which was affirmed by the Supreme Court. No interest was prayed for in the libel, nor decreed in the judgment by the district court, and however salutary it might be for the district court to have that power, to Supreme Court does not think it exists.

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January, 7th.

Present :—TEMPLE, J., and STEWART, J.

D. C. Colombo, No. 46,627. — *Armitage Brothers* v. *The Peninsular and Oriental Steam Navigation Company.*

Contract—place of execution—cause of action—jurisdiction of the district court of Colombo—*inter fauces terrae*—custom house point and Mutwal point—Charter, 1833—Royal Letters Patent, Jan. 1843—Ordinance No. 9 1843—Proclamation, 12th Dec. 1844—the "harbour" of Colombo—inner harbour and outer roadstead—difference

This was an action to recover damages for the breach of a contract on the part of the defendants, to carry a certain cargo of rice from Bombay to Colombo.

The libel alleged that defendants undertook to carry in the s.s. *Malacca*, then lying at the port of Mazagon (Bombay) and advertised and ready to set sail on the 6th November, 1866, 12,000 bags of rice from Mazagon to Colombo, and to deliver the same to the plaintiffs; that defendants agreed to receive the goods on board if delivered on or before the 5th November; that plaintiffs tendered the said goods on or before the 5th November to the accepted and carried by the defendants from Mazagon to Colombo, and requested the defendants to carry the same as aforesaid; yet the defendants received only 5,247 bags and refused to carry the remaining 6,753 bags, but detained the said goods and conveyed the same in another vessel, which arrived at Colombo on the 22nd November 1866, whereby the plaintiffs lost a favourable market for the sale of the goods and were deprived of the gains and profits which would have accrued to them by the sale of the said 6,753 bags, had the same been conveyed according to defendants' contract in that behalf in the s.s. *Malacca*, which reached the port of Colombo on 10th November 1866.

Plaintiffs claimed £5,446 12*s.* 2*d.* as damages.

The defendants without pleading over in the first instance,* took exception to the jurisdiction of the court to entertain the suit. They contended (1) that the "act, matter or thing" (cl. 24 of the charter) in respect of which the action was brought transpired beyond the jurisdiction of the court, namely, at Bombay, and

* For judgment on the merits, see *infra* under date December 3.

that those words did not include a case of mere omission such as that complained of against the defendants; and (2) that as the vessel by which the rice was to be conveyed was too large to come into the inner harbour of Colombo and her cargo had to be discharged in the open sea, no part of the contract was to be performed in Colombo.

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— between land jurisdiction of a court and the international right of Her Majesty to adjoining seas, within a marine league—Merchant Shipping Act, 1854, cls. 517 and 521.

The learned district judge over-ruled the plea, holding that the words of the charter were large enough to comprehend a case of a mere omission, and though the ship could not enter the inner harbour, sec. 521 of the merchant Shipping Act of 1854 brought the case within his jurisdiction.

Defendants appealed.

Morgan, Q. A. (with him *Lorenz*) for plaintiffs respondent, *Dias* for appellant.

The following is the judgment of the Supreme Court :—

This case comes before the Supreme Court on a question of jurisdiction. The alleged contract is a contract made at Bombay to receive there a certain quantity of rice on board of the steam ship *Malacca,* to convey the said rice to Colombo and to deliver the same at the port of Colombo.

The alleged breach is that the defendants refused to receive and carry part of the stipluted quantity of rice, and that they carried to and delivered at Colombo a part only of the stipulated amount. Special damage by reason of the non-delivery of the residue is alleged in the libel.

It is not however by the pleadings only that the question of jurisdiction is to be determined. We have also to consider the evidence documentary and oral given at the trial: some parts of this evidence are very important. It was also argue by the learned counsel on both sides with a view to save the expense and delay of taking further evidence that we should be at liberty to use our own knowledge of the localities of Colombo, and of the adjacent seas, and also our own knowledge of the local usages here as to matters connected with its port, habour or harbours, and its roadstead, whatever be the correct designation of each locality.

We will consider these topics presently. First, we will examine the words of our charters, ordinance and official proclamations which give jurisdiction to the district court of Colombo and which define its territory. The Royal Charter of 1833 by its 94th section ordains that each district court "shall be a court of civil "jurisdiction and shall have cognisance of and full power to hear "and determine all pleas, suits, and actions in which the party or "parties dependant shall be resident within the district in which any "such suit or action shall be brought, or in which the act, matter or

1868. Jan. 7. "thing, in respect of which any such suit or action shall be brought, "shall have been done or performed within such district."

We may pause here for the determination of one branch of the question of jurisdiction. It is conceded that the defendants were not resident within the territory of the Colombo district court, and it has been objected on the part of the defendants that, even if we suppose the place for delivery according to the contract to have been within the jurisdiction of the Colombo district court, still the mere omission to deliver was not "an act, matter or thing done or performed" within the meaning of the charter.

The objection in this form was scarcely, if at all, urged by the learned counsel for the defendants in the arguments before us, but it was pressed in the court below, and we think it right not to leave it unnoticed. But it is enough for us to say that we adopt the judgment of the learned district judge on this part of the case, and we consider the Colombo court to have had jurisdiction, if the place for delivery was within its district.

To ascertain this we must look a little further to the legislative instruments respecting our district courts. The most important authority on this part of the subject is the Ordinance No. 9 of 1843 which received Her Majesty's confirmation. This Ordinance recites certain letters patent of Her present Majesty dated 28th January 1843 which, *inter alia*, give authority to the Governor with the advice of the Legislative Council to alter and regulate the territorial limits of the jurisdiction of the court of civil or criminal justice within the island. The first section empowers the Governor with the consent of the judges of the Supreme Court, to divide the island into certain circuits and empowers the Governor with the like concurrence to alter the same, as occasion may require, by proclamation issued by him. The 2nd section authorises the Governor by proclamation to subdivide the circuits into districts, and to alter such subdivisions from time to time. The charter of 1833 had already ordered (see clauses 19 and 20) that there should be a district court for every district.

Under the Ordinance of 1843, the island was divided into three circuits, and, among the districts into which the midland circuit was subdivided, was the district of Colombo, which by a proclamation of 12th December 1844 was appointed to consist of the "fort, town and *harbour* of Colombo," and also of certain inland districts, which it is unnecessary to set out here, as the sole matter for our consideration, on this part of the case, is, whether the part of the sea at which the ship *Malacca* was to deliver her cargo was within the jurisdiction of the Colombo district court. The material word in the proclamation is the word "harbour." The division of the island into circuits has been varied since the date of

the Ordinance of 1843; and other proclamations have from time to time appeared defining (among other matters) the limits of the districts of the district court of Colombo. But it is needless to set them out in detail. They all follow the terms of the proclamation of December 1844. They all say that the district is to comprise the "harbour" of Colombo. None of them uses the word "port" or "roadstead" or "outer or inner harbours" in speaking of the localities that are to be within the Colombo district court jurisdiction. 1868. Jan. 7. —

We must now consider the local details of our Colombo seaboard.

Between custom house point and Mutwal point at Colombo there is an inlet of the sea with anchorage ground, which is without dispute *inter fauces terræ* and within the territorial jurisdiction of the Colombo district court. But only vessels of small tonnage can come in here, in consequence of the shallow water and of sand bank, which form a bar extending partly across the opening between custom house and Mutwal points. Larger vessels, such as the *Malacca*, anchor and deliver and receive their cargoes outside the bar at a distance of between one and two miles from the shore.

By far the greater part of the shipping that comes to Colombo remains outside the bar. The delivery of cargo is made over the ship's side, as the ship lies in the roadstead, into boats sent out by the consignees; and the delivery is complete when the goods are in the consignees boats.

About 20 miles to the North of Colombo a point called Negombo point projects a little way into the sea, and about 7 miles to the south of Colombo there is projection of rock called Mount Lavinia. A line drawn from one of these points to other would include the place at which the *Malacca* anchored, on the voyage in question, and which was her proper place for delivering cargo. An attempt was made in our district court many years ago, to treat all this space between these two points as the harbour of Colombo. We have not been able to obtain the record of that case but we believe that the attempt was unsuccsssful. It certainly deserved to be so. Negombo point is scarcely discernible from Mount Lavinia, and no man could see from one point what was being done at the other.

The excrescences of the land at Negombo and Mount Lavinia are extremely slight, and there is nothing like a continuous curvature of the coast between them. It would be an abuse of terms to call the whole space between them a haven, an inlet or even a bay. We cannot consider this whole space to be *intra fauces terræ*. We cannot liken it to the "King's Chambers" which Sir Leoline Jenkins and other old civilians speak of: nor can we term it "a chamber formed by headlands," in the language of more recent jurists.

1868. Jan. 7. — The port of Colombo, as defined by the proclamation to be hereinafter next noted, certainly includes the *Malacca's* place of delivery; but we do not think that this circumstance decidest the present question. By Ordinance No. 6 of 1865, called "the master attendant's Ordinance 1865" the Governor has power with the advice and consent of his Executive Council to declare by proclamation the ports which are to be brought within the operation of the Ordinance, and to define the limits of those ports. A proclamation, issued on 6th January 1866 in pursuance of that Ordinance, declared the limits of the port of Colombo as "north, a line extending due west from Mutwal point to a distance of 2¾ miles; south, a line extending due west from the flag staff to a distance of 2 miles." This, as we have said, would include the usual anchorage ground where such vessels as the *Malacca* deliver cargo. It would include in fact, both what we believe we may accurately term "the inner harbour" and what we may with equal accuracy call "the outer roadstead," meaning by the inner harbour the inlet between custom house point and Mutwal point, and meaning by "outer roadstead' the anchorage ground outside the bar, where large vessels habitually load and unload.

The interpretation clause of this Ordinance says that the word "port" shall include harbours and roadsteads, but it nowhere says that roadsteads are to be for all purposes the same as harbours, and we think that it makes the limits of ports appointed by the Governor limits for the purposes of that Ordinance only, and those purposes appear to be the maintenance of good order among the shipping, regulations of pilotage, of the licensing of cargo boats, and similar matters.

We therefore have to come back to the consideration whether the outer roadstead is part of the harbour of Colombo within the true and lawful meaning of the charters, ordinances and proclamations by which the limits of the district of Colombo throughout which its district court has power are to be determined.

Before reverting to this, it may be useful for us to state that we consider it to be fully proved that all the parties to this contract knew and intended that the *Malacca* would and should anchor and deliver her cargo in the outer roadstead, and that she in point of fact did anchor and deliver there on this voyage, and that the plaintiffs sent their boats out to her there, and received from her there the portion of the stipulated amount of rice, which she brought from Bombay.

We also may observe that we consider it to be our duty to give a full effect, as the fair meaning of the words will allow, to the royal charters, the ordinances allowed by Her Majesty, and the proclamations issued under them, that apply to this case. We

humbly consider Her Majesty to have fully as much authority and prerogative over the ports, habours, sea-shores and adjacent seas of this island as over the ports, harbours, sea-shores and adjacent seas of the British islands. These rights are "Regalia" by Roman Dutch law—see as to this Voet, bk. 1 tit. viii. sec. 9, and bk 41 tit. 1 sec. 1. See also Groenewegen de Legibus Abrogatis, p. 18. Christinæus lib. vi, decis., 1 and vi. Van Leeuwen p. 4 and Liber Feodorum, book 2 title 4. 1868. Jan. 7.

After giving accordingly the fullest fair force to the charters confirmed by Her Majesty and to the proclamations that apply to the matter before us, we think that, were it not for the Merchant Shipping Act, which will be presently considered, we could not consider the jurisdiction of the Colombo district court to extend seaward beyond the limits of the inner harbour, that is beyond the *fauces terræ*. It is clear that nothing can be within the jurisdiction of a district court that is not within the jurisdiction of the Supreme Court. The primary division of the island for judicial purposes is into large districts for which the criminal sessions of the Supreme Court are to be held. These large districts are then subdivided into smaller districts, for each of which there is a district court. We cannot hold any part of the adjacent seas not being *intra fauces terræ* to be within a district court's or the Supreme Court's jurisdiction; unless we consider that the Royal Charter of 1833, the Royal Letters Patent of January 1843, the Ordinance No. 9 of 1843, and the proclamation issued under that Ordinance intended, to treat the seas and the soil of the sea-shore, to the extent of three miles all round our coasts as being not only subject to the dominion of Her Majesty for purposes of international law, but as being such adjuncts, such mere appurtenances of the land itself, that the court of this island have necessarily jurisdiction over these its sea-ward fringes. We can find no authority for such a doctrine: and there is high authority against it. In the case of *King* v. 49 *casks of Brandy*, reported in 3 Haggard, p. 259, the Lord of the Manor of Poole claimed certain casks that had been found floating at sea within three miles from the shore. He claimed them as grantee from the Crown. Sir John Nicholl in giving judgment said as to this part of the case, "as to the right of the Lord extending three miles beyond the water, it is quite extravagant as a jurisdiction belonging to any manor. As between nation and nation, the territorial right may, by a sort of tacit understanding, be extended to three miles, but that rests upon different principles, viz., that their own subjects shall not be disturbed in their fishing and particularly in their coasting trade and communications between place and place during war, and they would be exposed to danger if hostilities were allowed to be carried on between belligerents nearer to the

1868. Jan. 7. shore than three miles; but no person ever heard of a land jurisdiction of the body of a county which extended to three miles from the coast."

We may also on this point refer to the judgment of the Lord Chancellor in *Gann* v. *The Company of Free Fishers of Whitstable*, decided in the House of Lord in 1865, and reported in vol. 35 L. J. p. 29. This subject was also argued in the case of the "Saxonia," reported in Lushington's Admiralty reports, vol. 1 p. 149. In that case a foreign ship that was navigating part of the sea between the Isle of Wight and Hampshire, less than three miles from the shore, was treated both by the judges of the Admiralty Court, and the Lords of the Privy Council in appeal, as not being in British waters and within the body of a county, but as being on the high seas.

There is also the fact with regard to our local legislation that in 1845 an Ordinance was passed here, by which any court "and judge and other person" was to be authorized to "exercise the same powers connected with the administration of criminal justice at any place at sea within three miles of the limits of his jurisdiction on land, which he might lawfully exercise within such limits." This Ordinance was disallowed, as an improper attempt to give our island courts judicial powers on the seas within three miles. In 1845 another Ordinance against malicious injuries was disallowed, and one reason of the disallowance was that it included within the scope of its penalties certain offences committed at sea. The Ordinance against malicious injuries, No. 6 of 1846, which was allowed and confirmed by Her Majesty expressly states in the 7th clause that the provisions of its preceding clause against injuries to boats, ships and the like "do not and shall not be construed to extend to offences of the description therein specified, if committed at sea and not within jurisdiction of the Supreme Court of the island."

Altogether we feel convinced that, independently of the Merchant Shipping Act, the Colombo district court had no jurisdiction sea-ward beyond the inner harbour, which alone is *intra fauces terræ*, and which alone is meant (in our opinion) by the proclamation respecting the limits of the Colombo district which makes in include the harbour.

We must now consider the Merchant Shipping Act 1854, which the learned district judge regarded as giving him jurisdiction in the matter.

That statute by its 521st section enacts as follows :—

"In all cases where any district within which any court or justice of the peace or other magistrate has jurisdiction, either under this act or under any other act, or at common law, for any purpose whatever, is situate on the coast of any sea, or abutting on

or projecting into any bay, channel, lake, river, or other navigable water, every such court, J. P., or magistrate shall have jurisdiction over any ship or boat being on, or lying or passing on such coast, or being in or near such bay, channel, lake, river or navigable water as aforesaid, and over all persons on board such ship or boat, or for the time being belonging thereto, in the same manner as if such ship, boat or persons were within the limits of the original jurisdiction of such court, justice or magistrate."

This clause occurs in the tenth part of the act, the part which relates to legal procedure, and which "in all cases where no particular country is mentioned is to apply to the whole of Her Majesty's dominions",—see section 517.

After considerable doubt and difficulty, we have come to the conclusion that the learned district judge was right, and that the 521st section of this act of the Imperial Parliament gave him jurisdiction. The roadstead which was the place for the *Malacca's* delivery of cargo under the contract is certainly part of the sea on the coast of which the district of the Colombo court is situate, and it is within three miles of the coast. The *Malacca,* when she was delivering into the cargo boats, was a ship lying off that coast, and the cargo boats that received her cargo, were boats lying off such coast. Both the ship and the boats appear to us to have been, by virtue of this act, within the jurisdiction of the distict court of Colombo, and it seems therefore that the defective delivery of the stipulated quantity of rice (which is the substantial cause of action) occurred within the jurisdiction of this court.

We were at first strongly inclined to think that this 521st section applied only to offences and causes of action under the act itself. It seemed to us that if we were to give the words of the section their natural and full meaning, we should be obliged to hold that our courts might claim jurisdiction over any crime or dispute that arose in a foreign vessel while passing within three miles of the coast of Ceylon.

But we have been relieved from this difficulty by noticing the construction which has been put on this act in several cases by the High Court of Admiralty and Privy Council. It has been held that the Merchant Shipping Act does not affect foreign vessels navigating the high seas, and that in such cases the words "any ship" must be taken to mean only any British ship. See the case of the *Saxonia,* Lushington 410, already referred to, and the case of the *Wild Ranger,* 1 Lushington 533, in which the other judgments are cited and reviewed.

On looking minutely to the words of this 521st section and of the sections near it, we observe that this section does not contain some important words of limitation which do occur in the immedi-

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ately preceding section, and which we think would have been repeated here, if a similar limitation had been intended. The 520th section says, "for the purpose of giving jurisdiction under this act, every offence shall be deemed to have been committed, and every cause of complaint to have arisen, either in the place in which the same actually was committed or arose or in any place in which the offender or person complained against may be."

But the 521st section is general and contains no such words, as those at the beginning of the 520th. And it is to be remembered that the Merchant Shipping Act is by no means confined to mere matters of discipline or disputes of ship owners, or ship masters, and crewes, with each other. The 9th part of the act (which also applies to the whole of Her Majesty's dominions) relates to the liability of ship owners, and contains many important provisions as to the right of the shippers of merchandize, of passengers and of consignees. We do not suppose that the framers of the Merchant Shipping Act had before their minds the defective jurisdiction of the Colombo district court in respect of mercantile contracts to be performed in the outer roadstead: but we ought not on that account to limit the operation of a clause, which according to the natural interpretation of its words, seems ample enough to be remedial of the mischief of that defect in jurisdiction. On this matter we would follow the rule expressed by Lord Denman in *Fellows* v. *Clay*, 4 Q. B. 339, and hold that "the mischiefs, which were immediately before the mind of the legislature, were but the motive for legislation, and that the remedy may both consistently and wisely be extended beyond the mere cure of that evil to every provision, which the most comprehensive view of the law, the state of manners, and of society at large may appear to render expedient."

We have gone thus at length into this case in all its branches, on account of the great importance of the subject, to our mercantile and indeed to our general community. The hardship of not being able to sue in the courts of our island for matter such as those in the present case, would be very great. That hardship is of course no adequate reason for straining the law, and we have been very solicitous not to do so. But we think on the whole, that the words of the Mercantile Shipping Act fairly bear the meaning which the learned district judge has given to them, and accordingly the judgment is affirmed.

February, 14th. 1868. Feb. 14.

Present :—TEMPLE, J.

C. R. Colombo, No. 53,390. / 51,508. — *Velupillai* v. *Raman*, et. al.

Per SUPREME COURT —

It has been contended that although the plaintiff is prevented, by the 66th cl. of Ordinance No. 16 of 1865, from recovering the articles pawned, he may nevertheless recover their value. The Supreme Court thinks he cannot, and that the intention of the legislature was to avoid such contracts altogether, and not in part. See C. R. Colombo, No. 37,754, Supreme Courts judgment, 1st March, 1860. Ordinance No. 16 of 1865, cl. 66 —pawn.

Present :—TEMPLE, J.

C. R. Tangalla, No. 11,490. — *Dias* v. *Andris.*

Lorenz for appellant.

The order of the court below was set aside and case remanded for hearing in these terms:— Power of commissioner to review his own judgment.

The judgment having been re-opened by the commissioner, he cannot on a subsequent day decide that he was wrong, and order the judgment by default to stand.

April, 11th.

Present :—CREASY, C. J.

C. R. Galle, No. 35,508. — *Andris* v. *Dingo.*

Lorenz for the appellant.

Per CURIAM :— Over-hanging tree—right to cut down overhanging portion.

Set aside, and sent back for further hearing: each party to be at liberty to amend his pleadings.

The whole of the proceedings in this case seems to have been

1868. April 11. taken under an erroneous impression as to the law. A householder, whose premises are over-hung by another man's tree, has no need to prove actual damage, but may at once bring his action to get the over-hanging portion of the tree cut down. See Voet and Grœnewegen, in their commentaries on the title, "*De Arboribus Cædendis.*" Also *Digest*, lib. xliii, tit. 26. And see the case No. 39,971, C. R. Colombo, decided in the Supreme Court on the 25th of June 1867, where the relative right of tree owners and land owners are fully discussed.

Present :—Creasy, C. J.

C. R. Ratnapura, No. 4,646. } *Baba Appu* v. *Londina.*

Contempt—witness—chewing betel.

The Supreme Court reduced the fine imposed by the commissioner, on Gan Arachchi, a witness in the case, on the charge of contempt of court. The following is the judgment :—

It is not every deficiency in good manners on the part of an ignorant native, that justifies a fine for contempt of court; and, in this case, instead of an express adjudication, after proper enquiry, that the witness was guilty of contempt of court, the commissioner writes as follows :—"Lekamalage Mudelihami Gan Arachchi, who "was charged with contempt of court, appears. Being asked what "he has to say in excuse of having come into the witness box "chewing betel, says, he is not accustomed to give evidence. This "is no excuse, and to teach him manners he is fined £1."

The Supreme Court has, of late, been frequently obliged to caution the judges of the minor courts to be prudent and temperate in their exercise of the power of fining for contempt. But the Supreme Court is most anxious to support them in putting down manifest insult and gross indecorum on the part of any one who comes into their courts. This witness Mudelihami Gan Arachchi must have known perfectly well that by chewing betel in the witness box he was treating the presiding judge with disrespect. The Supreme Court will, therefore, not altogether set aside the fine which was imposed on him; but the amount ought to be reduced from the sum which the commissioner thinks adequate to teach a lesson in manners, to the sum which the Supreme Court thinks, under all the circumstances of the case, an adequate punishment for a not very heinous contempt. Fine to be reduced to five shillings.

June, 16th.

1868. June 19.

Present :—Creasy, C. J., Temple, J., and Stewart, J.

D. C. Colombo, No. 45,059. } *The Royal Bank of India v. Dyer, and the Bank of Hindostan, China and Japan, (Limited.)*

Jurisdiction.

The following is the judgment of the Supreme Court :—

The Supreme Court cannot see that the applicant has any right in this proceeding to raise the question of the district court's jurisdiction.

He goes to the district court and claims to have some money paid over to him. The district court refuses to do so. His appeal is against this refusal. The Supreme Court cannot call the refusal erroneous, because the applicant now says that the district court had no jurisdiction whatever over the matter.

We quite agree with the observations of the district judge on our Ordinance of Frauds.

June, 19th.

Present:—Creasy, C. J., Temple, J., and Stewart, J.

D. C. Matara, No. 23,283. } *Illangakoon v. Alie.*

Ordinance No. 4 of 1867, cl. 63—groundless claim—fine to be inflicted under what circumstances.

The appellant, Abdul Rahim, who was claimant in the above case, had been fined for preferring a frivolous claim, under cl. 63 of Ordinance No. 4 of 1867.

The Supreme Court set aside the fine in these terms :—

The decision as to the fine imposed on the claimant is wrong. The 63rd cl. of the present Fiscal's Ordinance 1867 is identical with cl. 16 of Ordinance No. 1 of 1839, and the Supreme Court has before held, following the clear words of the legislature, that the power to fine for a groundless and frivolous claim depends upon a finding in a judgment to be pronounced in a suit, and instituted by or against a claimant. Where there is no such suit there can be no such judgment and no such finding, and there ought to be no such fine.

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June 19.

June, 19th.

Present:—Creasy, C. J., Temple, J., and Stewart, J.

D. C. Colombo, No. 44,460. *Meera Lebbe* v. *Carson.*

Principal and agent—credit to whom given.

Plaintiff, a master mason, sued the defendant *inter alia* to recover a balance sum of £94 said to be due for work and labor done and materials provided.

Defendant pleaded never indebted.

On the day of trial, it was contended for him that as the contract sued upon was between the plaintiff and the Asiatic Bank Corporation, of which the defendant was the manager merely, he was not liable.

The district judge found as follows :—

"The court is of opinion that the defendant has acted throughout as manager of the A. B. C., and not in his individual capacity, and that the plaintiff was aware that the building on which he was employed was for the corporation and not for defendant; that he gave credit to the bank, made out his bills in the name of the bank, received payment from the bank, and orders and directions from another official of the bank, and that he has his remedy against the bank and not against the defendant. The court must therefore nonsuit the plaintiff."

Plaintiff applealed. *Dias* for him; *Cayley* (with him *Ferdinands*) for defendant respondent.

It was contended for plaintiff (*vide* appeal petition) that defendant was liable, because credit was given to him personally, and because defendant was the agent of a foreign principal.

The Supreme Court affirmed the decree of the court below, referring to *C. R. Batticaloa* 17,000,* on the question of the liability of foreign principals.

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* *Morris* v. *Armitage*, ante, p. , December 6th, 1867.

June, 23rd.

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June 23.

Present :—CREASY, C. J., TEMPLE, J., and STEWART, J.

D. C. Colombo, No. 47,823. } *Dias* v. *Ondaatjie.*

Ordinance No. 1 of 1844, cl. 8—liability of occupant to share in renewal of defective boundary—nature of boundary.

This was an action brought by the plaintiff under sec. 8 of Ordinance No. 1 of 1844, to compel the defendant, a monthly tenant of certain land adjoining the plaintiff's to pay twice the amount of the cost incurred by plaintiff, after due notice to defendant, in building a partition wall.

The defendant denied his liability to pay the expenses said to be incurred, or the applicability of the Ordinance No. 1 of 1844 to the case in question, and pleaded that the boundary between the conterminous lands was clearly defined in the manner specified in the said Ordinance, and that the Roman Dutch law and the custom of the country had determined the liability as to the making and renewal of boundaries in manner other than that prescribed by the Ordinance.

The court dismissed plaintiff's case, being of opinion that sec. 8 did not bind a monthly tenant to incur the expense of defining the boundaries of the land he occupied, and that the legislature did not alter the common law as to the person who should be liable to perform this duty.

Plaintiff appealed. *Lorenz* and *Cayley* for him, *Morgan, Q.A.* for defendant respondent.

The Supreme Court affirmed the decree of the court in these terms :—

We must affirm this nonsuit, but not for the reasons given by the learned district judge. This court differs from him as to the occupant's liability to share in the renewal of a defective boundary. The 8th clause of Ordinance No. 1 of 1844 seems clear that he may be called upon to renew half the boundary, and that he is not simply qualified to receive a notice on behalf of the proprietor. But the boundary meant by this ordinance is not necessarily a wall, or even such a fence as will keep out cattle. It may consist of sticks or stones placed at intervals, so that they accurately show the line of division. See sec. 3rd of the Ordinance. The plaintiffs right to proceed under the 8th clause depended on the defective state of the boundary line as explained by the 3rd clause. It is quite clear that the old fence was enough as a boundary line, and the plaintiff has no right to make his neighbour pay for a wall.

1868. July 2.

Oath—witness—baptist—Ordinance No. 3 of 1843—mode of swearing.

D. C. Kurunegala, No. 17,230. } *Ratnapale Unanse* v. *Kiri Baya.*

The Supreme Court remanded the case for further hearing in these terms :—

The first witness called on behalf of the applicant was not examined on the ground that, being a christian, he objected to being sworn on the bible, though not objecting to an oath itself.

It is also noted that the witness was of the baptist persuasion.

The Ordinance No. 3 of 1842, to which the district judge refers, requires "that every individual not professing the christian "faith, and every Quaker, Moravian or Jew, shall, on all occasions "whatsoever, where an oath is required by the existing or by any "other law hereafter to be made, make a solemn affirmation or "declaration in lieu thereof."

The Ordinance makes no alteration as to the mode in which oaths are to be administered to christians, (other than those as above excepted.)

With respect to these the provision of the law is consequently still in force that no particnlar form or ceremony of administering the oath is necessary, and that they may be sworn "in such "manner as they may deem binding on their consciences." Taylor on Evidence, sect. 1,255; and Roscoe on Criminal Evidence, p. 112, and cases therein cited.

Where a witness refused to be sworn in the usual manner by laying his right hand on the book and afterwards kissing it, but desired to be sworn by having the book laid open before him, and holding up his right hand, he was sworn accordingly. *Dalton* v. *Colt*, 2 Sid. 6 Willes, 553.

So also a Scotch witness has been allowed to be sworn by holding up the hand without touching the book or kissing it. *Rex* v. *Mildrove*, Leach 412.

Costs to stand over.

July, 2nd.

Present :—Creasy, C. J., Temple, J. and Stewart, J.

P. C. Galle, No. 64,651. } *Hindle* v. *McLean.*

Ordinance No. 16 of 1865, cl. 70—police officer—excess of authority—

This was an appeal against a conviction under clause 70 of the Police Ordinance of 1865.

Cayley appeared for defendant appellant.

The Supreme Court affirmed the conviction as follows:—

It is quite clear that the policeman in this case exceeded his powers. Section 25 of Ordinance No. 1 of 1864 authorizes

officers to enter and search houses (after proper demand) in which a person is known or suspected to be, whom the officer is authorized to arrest for crime or suspicion of crime. But if the authority to arrest be wanting, there is no authority to search. According to the defence set up, the charge which had been made to the officer in this case against the supposed Malay offender was a mere charge of common assault. It was not committed in the officer's view, and is not one of the "grave or forcible crimes and outrages or aggravated assault" for which clause 52 of the Police Ordinance of 1865 gives an officer authority to arrest on credible information, or reasonable suspicion. Nay more—the 62nd cl. of this Ordinance expressly prohibits police officers from receiving complaints of petty offences, or taking into custody persons brought to them "accused of such petty offences as trespass, assault, quarreling or the like."

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power to arrest or search—malice.

It remains, however, to be considered whether this police officer when he thus exceeded his powers did so "knowingly and wilfully, and with evil intent," so as to bring him under the 70th sect. of the Ordinance. We have all read through and carefully considered the evidence, and we are satified from the manner in which he behaved on Mr. Vanderspaar's premises, and from the evidence of his superior officer, that he knew that he had no lawful authority to act as he was doing, and that he acted so for the purpose of annoyance. He was therefore liable to the summary punishment directed by the 70th clause. The plaint is defective for not containing the words "and with evil intent." But this is a mere error in law which did not prejudice the substantial rights of the defendant, in as much as his defence was fully gone into, by which he endeavored to prove that he had reasonable cause for acting as charged. The plaint ought to have been amended at the hearing by the insertion of the words "and with evil intent."

The Supreme Court directs it to be so amended now, and the conviction is affirmed.

P. C. Negombo, No. 14,058. } *Ahamat v. Tamby Nana*

In the following judgment of the Supreme Court, the facts are sufficiently clear :—

Ordinance No. 16 of 1865, cl. 92—"other matter of annoyance or obstruction."

The Supreme Court thinks that this case does not come within the 92nd cl. of the Police Ordinance 1865.

The general words "other matter of annoyance or obstruction" are restrained by the preceding particular words about

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"lying and casting dirt and rubbish." The general words can only be held to apply to acts of similar nature: and the placing a crate of crockery on the highway for the purpose of unpacking it, and keeping it there a long time until unpacked, (which is the act proved here) is not at all like casting dirt and rubbish on the road.

We may remark that we think the general words in the Road Ordinance No. 10 of 1861, clause 94, sect. 7, are similarly limited.

But the defendant is clearly proved here to have committed an offence at common law. No man has any right to use the public highway as part of his own premises for his private business, and thereby obstruct the traffic, and annoy the public, as is proved to have been done by the defendant on the present occasion.

The conclusion of the plaint as against the Ordinance instead of leaving it as a charge at common law is a mere informality by which the substantial right of the defendant could not have been prejudiced.

Treating the case as an offence at common law, this court affirms the conviction.

D. C. Batticaloa, No. 1,440. } *Queen* v. *Karte Lebbe.*

Judge—prosecutor.

The Supreme Court quashed the proceedings of the court below, observing,—

In this case the judge who tried the prisoners had himself, as D. Q. A., prepared and signed the information on which they were tried. He was the original prosecutor. The Supreme Court thinks that was a violation of the cardinal maxim "no man should act as judge in his own cause."

July, 10th.

Present:—Creasy, C. J., and Stewart, J.

C. R. Matale, No. 21,307. } *Hapua* v. *Christie.*

Cattle trespass—misconduct of owner of cattle—reduced damages.

The amount awarded by the commissioner, as damages consequent upon defendant shooting plaintiff's buffaloe, was reduced by the Supreme Court, in the following judgment:—

The defendant ought to have given evidence at the trial of the circumstances asserted in his petition of appeal, namely, that it

was impossible to seize or identify the trespassing animal. In the absence of such evidence, the commissioner was right in giving judgment against him. The license to shoot is correctly interpreted in the judgment. The owner of the property ought (or those acting for him ought) to make all fair endeavors to seize or identify the trespassing animal before they shoot it. In cases where from the nature of the ground or viciousness of the animal or other reasons it is self-evident that all endeavours to seize or identify would be useless, it may be excusable to shoot at once. But there is no proof of this kind in the case before us.

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While we consider that judgment was rightly given against the defendant, we are by no means satisfied with the finding of the commissioner as to the amount of damages. He has given the full amount of the value, which the plaintiff's witnesses set upon the animal. In the case C. R. Kurunegala 7,976 decided in the Supreme Court on the 4th of December 1863, we very fully discussed the law as to the measure of damages in such cases, and decided that if there has been misconduct on the part of the owner of the animal, the damages may properly be reduced below the animal's value. In that case there was clear proof that the plaintiff had wilfully and intentionally turned his buffalo out to trespass on the defendant's coffee estate, while the defendant, though his license to shoot was defective, had acted without the least malice or intentional impropriety. We there reduced the damages from £5 to 5*s*. There is not in the present case the same clear proof of intentional misconduct on the part of the plaintiff; but the manner in which he proved his case is very suspicious. He rests it on the admission that the defendants shot the buffalo, and on mere evidence of value. He does not come into the box himself, and he gives no means of testing whether he intended the buffalo to trespass on the coffee estate, or whether he took reasonable means to prevent such trespassing. The charge made by him that the said defendant removed and appropriated the meat of the animal is proved to be untrue. For all that appears, the plaintiff had the carcase himself. The owner of the animal which is killed while in the act of trespassing, if he wants to recover its full value, ought to present a much fuller and clearer case than is furnished here. We shall reduce the amount of damages by one-half.

As we pointed out in the Kurunegala case it is always open for the defendant in a case like the present to set up by way of reconvention a claim for compensation for the damages done by the trespassing animal to his property.

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July, 16th.

Present :—CREASY, C. J., and STEWART, J.

D. C. Galle, No. 26,793. } *Fraser v. The Queen's Advocate.*

Actionability of wrong-doers—the crown and civil service—nature of the tenure by which civil servants of Ceylon hold their offices—authority of the crown to dismiss such officers at will—in what manner that authority may be exercised—right to sue the Queen's Advocate for breach of contract or delict by the Government—power of District Court or Supreme Court to review a decision of the Governor and his Executive Council.

Plaintiff sued defendant for the recovery of balance salary due to him as post-master of Galle and as packet agent. He alleged that he was without cause, and in opposition to the colonial rules and regulations, evicted from his offices and deprived of the salaries due to him.

Defendant pleaded *inter alia* that the plaintiff was suspended from office for disobedience to lawful orders and dismissed, and that even if his suspension was opposed to the colonial rules and regulations, a non-compliance with them gave him no right of action against the crown.

The district judge found in favour of plaintiff and gave him judgment as prayed for.

Defendant appealed. *Morgan, Q. A.* (with him *Cayley*) appeared for him, *Lorenz* for plaintiff respondent.

The Supreme Court set aside the decree of the court below in the following judgment,* which is explicit as to the facts of the case :—

The plaintiff in this case, Mr. George Gunn Fraser, was on the 30th of July 1858 appointed by the then Governor of this Island deputy post-master general of Galle.

The material words of the letter of appointment are as follows :—

"His Excellency the Governor has been pleased to appoint you deputy post-master general, Galle."

On the 30th of April 1860 the post-master general in England appointed Mr. Fraser as post-master of Galle, to the office of packet agent at Galle. The letter stated that the office of packet agent at Galle was in future to be filled by the post-master at Galle.

Mr. Fraser continued to hold these appointments until the occurrences hereinafter mentioned.

In the beginning of 1866 complaints were made as to alleged irregularities of Mr. Fraser in attendance at his office in Galle. A correspondence ensued on this, but there was not then any formal official enquiry under those colonial rules and regulations, which we shall fully refer to presently.

* This judgment was affirmed *in review* on 24th November 1868.—ED.

On the 7th of March 1866, the acting post-master general for the Island, by direction of the Governor, informed Mr. Fraser that "His Excellency is of opinion that the good of the service re- "quires an exchange of duties between you and the deputy post- "master general of Kandy, and I have therefore to direct you to take charge of the Kandy post office without delay." 1868. July 16.

Mr. Fraser, in reply, declined the appointment at Kandy, and protested against being deprived of his appointment at Galle without a hearing before the Executive Council as is provided for in the colonial rules and regulations.

On the 21st of March 1865 Mr. Cairns, the then acting postmaster general for the Island, by the Governor's direction, took possession of the post office at Galle, against Mr. Fraser's protest. And since then Mr. Fraser has not been allowed to attend to the duties of that office: and he also ceased to act as packet agent.

On the 14th of April 1866, Mr. Fraser enquired by letter from the colonial secretary: "whether he was to consider himself suspended from pay and office." He at the same time repeated his refusal to take charge of the Kandy post office.

A letter of 26th April from the colonial office informed Mr. Fraser that he had not been suspended, but that it had been thought desirable that he should be tranferred to Kandy.

By letter of 29th of April to the colonial office, Mr. Fraser complained that he had been virtually suspended, and again declined the Kandy appointment.

By letter from the colonial office of 8th May 1866, Mr. Fraser was informed that his case would be brought before the Executive Council with a view to his suspension, on the charge of disobedience of orders in refusing to take charge of the Kandy post office when directed to do so; and he was asked to submit in writing any defence which he desired to offer.

Mr. Fraser, on the 13th of May 1866, sent to the colonial secretary a written justification of his conduct. The subject appears to have been brought before the Executive Council, and on the 26th of June 1866, the following notification was sent to Mr. Fraser from the colonial secretary:

"His Excellency the Governor has laid before the Executive "Council your letter of the 13th ultimo with the previous corres- "pondence on the subject of your removal from Galle to Kandy, "and your refusal to proceed to the latter station; and I have it in "command to inform you that His Excellency, with the advice of "his council, has formally suspended you from office, for continu- "acy in declining to proceed to the station allotted to you, and he "will accordingly submit to the Secretary of State a recommen- "dation that you be removed from the public service."

1868. July 16. — Mr. Fraser appealed against this decision to the Right hon'ble the Secretary of State for the colonies. The result of that appeal appears by the following letter from the Right hon'ble the Earl of Carnarvon, the Secretary of State for the colonies, to the Governor of this Island, date, Downing street, 5th October, 1866 :

" I have the honor to acknowledge the receipt of your two " despatches Nos. 133 of the 27th June and 174 of the 8th August, " the first reporting the circumstances under which you had re- " moved Mr. George Gunn Fraser from his appointment as deputy " post-master at Galle, the second enclosing a memorial from Mr. " Fraser appealing against your decision.

" After having fully considered this correspondence, I see no " reason to disapprove of the course which you have adopted in " suspending Mr. Fraser, and I have therefore to confirm his sus- " pension—I request you will inform him that I have received his " memorial but that it does not appear to me to affect the justice of " your decision.

" But whatever may be the equity of Mr. Fraser's claim to " salary after he ceased to perform his duties, I do not think that " he should be deprived of any advantage which the rules of the " service may be reasonably said to secure to him; and I therefore " think, that, in accordance with the 87th cl. of the Colonial " Regulations, he should be allowed to draw his salary up to the " day in which he was suspended from office."

" I have, &c., " CARNARVON."

This decision was on the 10th November 1866, notified to Mr. Fraser by the following letter from the colonial office,—

" Your memorial dated the 29th July last appealing against " the decision of Government in reference to your removal from " the office of deputy post-master at Galle having been forwarded " to the Right hon'ble the Secretary of State for the colonies, I am " directed to acquaint you that the Governor has received a despatch " confirming your suspension, and requesting that you may be " informed that his Lordship after having fully considered your " memorial does not think that it affects the justice of the decision " of the Government in your case."

" His Lordship however has been pleased to direct that you " be allowed your salary up to the day on which you were sus- " pended from office."

The Colonial Government had on the 13th of June 1866 paid Mr. Fraser £20 19*s.* 3*d.* as the amount of salary due to him up to the 21st March 1866, (the day on which Mr. Cairns took posses-

sion of the Galle post office. They subsequently on the 3rd December 1866 paid him the further sum of £79 14*s.* 7*d.* as the amount of salary due from the 22nd of March to the 26th of June 1866, the last mentioned date being that on which notice was given to him of his formal suspension. 1868. July 16.

It was admitted and agreed by the learned counsel on both sides, on the argument before us, that the amount of salary due for the packet agency also up to the 26th June 1866 has been paid: the date of this payment was not mentioned, but it must have been after the following letters.

On the 6th of December 1866 Mr. Fraser wrote to the colonial office complaining that his salary as packet agent was still due. He then evidently claimed it up to the 26th of July only, which he speaks of as to the date when he "was constitutionally suspended from office."

In answer to this he was by letters of 13th and 31st December 1866 directed to apply, if he thought fit, to the post-master general in England for his salary as packet agent from the 22nd of March to the 26th of June 1866.

On the 5th day of November 1867, Mr. Fraser brought the present action against the Q. A. He states in it, that he was and is a public servant of this colony by Colonial and Imperial appointment: that he was employed as deputy post-master at Galle at a salary of £300 and as packet agent with a salary of £100.

That on the 21st of March 1866 he was, without cause, and in opposition to the colonial rules and regulations, evicted from his offices, and has since then been deprived of them and their salaries.

Taking his collective salary at £400 a year, he claims from 21st March 1866 (the day of his eviction) to the 31st October 1867, *i. e.* to within 5 days from action brought. His gross claim as post-master for the year 1866 is £333 6*s.* 8*d.*, but he admits payments amounting to £100 13*s.* 10*d.* This is obviously made up of the sums £20 19*s.* 3*d.* and £79 14*s.* 7*d.* already mentioned. (See his examination.) So that in fact he is suing for his salary as Galle post-master from the 26th day of June 1866 to the time of action, and for his salary as packet agent from the 1st March 1866 to the time of action brought. It may be important to observe the exact nature of the claims.

The defendant in his answer admits that the plaintiff was for some time a public servant of the colony, and admits his employment at the salaries mentioned. The other allegations in the libel are denied. The defendant asserts that the plaintiff was suspended from office and dismissed, and the defendant denies that the plaintiff was suspended in opposition to the colonial rules and regulations.

1868. July 16. — The defendant also avers that the plaintiff held office during pleasure of the crown, and that a non-compliance (if such existed) with the colonial rules and regulations as to suspension gives no right of action against the crown or its representatives. He avers also that the plaintiff was suspended for disobedience of lawful orders, which suspension was approved of, and confirmed by Her Majesty's Government. The plaintiff in his replication denies the lawfulness of the suspension, the fact of its confirmation by Her Majesty's Government, and further says that no such confirmation could make it valid.

The district judge has dealt solely with the question whether the colonial rules and regulations were duly observed in the suspension and ultimate dismissal of the plaintiff. Having disposed of this question in plaintiff's favor, he has at once given him judgment for the full amount claimed.

We think that judgment erroneous; and after carefully considering the numerous important questions which this case raises, we have come to the conclusion that the plaintiff had no right to maintain this action, and that consequently judgment of non-suit should be entered.

The primary question is to ascertain whether the plaintiff held office during pleasure. We will first consider his more important office, that of the post-mastership of Galle. As to this, it is quite clear that he held it of the crown, during the pleasure of the crown. The general words of the letter of appointment granted to him by Sir Henry Ward, the then Governor of this Island, have already been set out, and Sir Henry Ward had no authority to make appointment except during pleasure. The royal commission to Sir Henry Ward has been put in evidence, and it refers, on the subject of appointments to office, to the royal instructions, which are also in evidence. They direct as follows: "We do hereby direct and "instruct you that all commissions and instructions to be granted "by you to any person or persons for exercising any office or em-"ployment in or concerning the said island be granted during "pleasure only."

The colonial rules and regulations (on which the plaintiff relies,) at the very beginning of the chapter which treats of appointments to public offices, declare the general rule that "throughout the British colonies, offices are granted and holden at the pleasure of the crown."

The part of the rules and regulations on which the plaintiff relies is the second part of this chapter, headed "suspension from office," containing rules from 78 to 88 inclusive. They are too long to copy here, but they are in evidence in this case, and we

shall state what we consider to be their general effect, as applicable to the present action. 1868. July 16.

They seem to us to apply solely to suspension on account of misconduct. They require that the officer shall have written notice of the offence with which he has charged. They require he shall have time to make his defence orally, or in writing, before the Executive Council of the colony; and that, if the decision be for his suspension, the Governor must send to the Secretary of State a report of the same with proper documents, "in order that the Secretary of State may confirm or disallow the same."

It never can be supposed that by thus directing a mode in which charges against an officer for misconduct are to be enquired into by the Governor and Executive Council, the crown intended to divest itself of the power of treating the officer as holding during pleasure only. There are many cases in which it may be most desirable and important to remove an officer, though he has committed no absolute offence, and though he has shown no absolute physical or mental incapacity for going through the duties of his office with literal exactness, and with perfunctory though unsatisfactory completeness. But the exigencies of the place or time may demand the immediate presence of an officer of superior tact or energy, or capacity, with reference to the special sphere of action. We put one possible or probable case; many others may readily be imagined. If an officer under any such circumstances is directed to leave his office, he may have a moral claim to receive fair and generous treatment by some other office being offered to him. But he cannot have any legal right to retain the office, which he received on the terms of holding it during pleasure, when it pleases the crown or the authorized ministers of the crown, to suspend or remove him.

To apply these principles to the present case, Mr. Fraser, who held the Galle post-mastership during pleasure, was, on the 26th of June 1866, suspended from that office by the Governor of the Island, acting in his capacity as Governor appointed by Her Majesty, and acting as by Her Majesty's authority. On the 5th of October following, Her Majesty, by her Secretary of State for the colonies, confirms the said suspension of Mr. Fraser from his said appointment. The effect of the confirmation and ratification (independently of the effect of the rules and regulations) was to make the suspending orders of the 26th July Her Majesty's own order, and as such it was clearly valid against Mr. Fraser.

We are further of opinion that the order of suspension, of the 26th June 1866, was made in conformity with the rules and regulations. We consider that we have no right, and that the district court had no right, to review the decision of the Governor and

1868. July 16. Executive Council on the merits of the case. All that we have a right to do, as to this question, is to see whether Mr. Fraser's case was tried before the Governor and Executive Council in the manner directed by the rules and regulations. It would be very improper in us to express an opinion one way or the other on the decision in which that trial terminated.

Now if it is clear that Mr Fraser has no right of action in respect of his appointment as post-master as to anything that happened on or since 26th June 1866, it is clear that he has no right of action at all, so far as the post-mastership is concerned, for the pleadings, the examination, and the evidence in the case shew plainly that he has been paid all his salary as post-master up to the time when (in his own words) he was "constitutionally suspended." We now turn to his claim for salary as packet agent. There is nothing in the pleadings as to any of this having been paid. This appears to be an imperial, not a colonial appointment. He has given no evidence to show that it was the duty, or the custom of the Colonial Government to pay him, nor has he given any evidence to show that the Imperial Government have refused to pay him. We might have directed evidence to be taken on this point, but the admission on the argument that the money has been paid, rendered that course unnecessary. Still as the payment is not pleaded, and its date in uncertain, we must consider the plaintiff's right as to this part of his case separately.

We cannot see that Mr. Fraser could have a right of action against the Queen's Advocate of this colony in respect of the affairs of the packet agent. The defendant has objected generally that the plaintiff has no right to maintain this action against him as representation of the crown, in respect of any of the causes of action which the plaintiff has averred. We think on this part of the case that a distinction may be drawn as to the plaintiff's claim for salary due under his colonial appointment, as post-master, and his claim for salary due under his imperial appointment as packet agent. We humbly consider that Her Majesty's predecessors and Her Majesty have been graciously pleased to lay aside, as to this island, part of the prerogative of the crown as to immunity from being sued. By proclamation of the 23rd September 1799, it was amongst other things published and declared that the administration of "justice and police in the settlements and territories in the "Island of Ceylon with their dependencies, shall be henceforth "and during Her Majesty's pleasure exercised by all court of "jurisdiction, civil and criminal, magistrates and ministerial officers, according to the laws and institutions that subsisted under "the aucient Government of the United Provinces, subject to such "deviations and alterations by any of the respective powers and

" authorities herein before mentioned, and to such other deviations " and alterations as shall by these present or by any future proclamation and in pursuance of the authorities confided to us, deem " it proper and beneficial for the purposes of justice, to ordain and " publish, or which shall or may hereafter be by lawful authority " ordained and published."

Afterwards, the Ordinance No. 5 of 1835, (which was allowed and confirmed by Her Majesty,) repealed parts of the said proclamation, but expressly reserved and retained so much of it as doth publish and declare that " the administration of justice and police " within the settlements then under the British dominion and " known by the designation of the maritine provinces should be " exercised by all the courts of judicature, civil and criminal, " according to the laws and institutions that subsisted under the " ancient Government of the united provinces."

The Ordinance of 1835, itself expressly re-enacts this, and it uses the following words, " which laws and institutions it is hereby " declared are and shall henceforth continue to be binding and " administered through the said maritime provinces and their dependencies, subject nevertheless to such deviations and alterations as " have been or shall hereafter by lawful authority ordained."

We humbly consider that by these declarations of the royal will, Her Majesty's subjects in this island, who had or might have any money due to them from the local Government for wages, for salary, for work, for materials, in short for anything due on an obligation arising out of contract, were permitted to retain the old right given by Roman Dutch law to sue the advocate of the fiscal, now styled the Queen's Advocate, for recovery of their money. And if the present plaintiff could have shown that any money was due to him under his colonial appointment as Galle post-master, he might have maintained this action. He might have done so in respect of salary due for any period during which he actually served, and also in respect of the further period for which he, still holding the appointment *de jure*, was ready and willing to serve, but was prevented from serving by the wrongful act of his employer. But we cannot see how the plaintiff can sue the colonial Government through the Queen's Advocate in this colony for an omission of the Imperial Government to pay salary due under an imperial appointment. The only way in which, as it seems to us, he could frame a case against the Colonial Government, is by charging them with having obstructed him and prevented him from fulfilling the duties of the packet agency, whereby his employers (the Imperial Government) refused to pay him the salary for the packet agency. This would be a claim on an obligation arising *ex delicto*, and we greatly doubt whether such an action was ever

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maintainable here against the Advocate, Fiscal, any more than a writ of right could have been maintained in England against the crown for damages for a wrong, as to which see *Toben* v. *The Queen*, 33 L. J., C. P. 190. It is however unnecessary to give now a positive decision on this matter as it is clear that, as to the time up to the 26th of June 1866, the plaintiff as packet agent has receive no consequential damage through any act of the Ceylon Government, but has been paid his salary up to that date. As to the time subsequent to the 26th June 1866, this plaintiff has clearly no right to sue the Queen's Advocate here. Either the packet agency is between him and the Imperial Government alone, or if that appointment is to be considered under all the circumstances as mere ancillary to the colonial Galle post-mastership, then inasmuch as he was legally suspended from the principal appointment on the 26th of June 1866, he was thereby lawfully suspended from the ancillary appointment also.

November, 5th.

Present :—Creasy, C. J., Temple, J., and Stewart, J.

P. C. Colombo, No. 3,756. } *Perera* v. *Fernando.*

Toll Ordinance.

The Supreme Court set aside the conviction and sentence in these terms :—

The words in the latter part of the clause, referred to by the magistrate, seem to the Supreme Court to have been used *ex magna cautela* and cannot properly be held to limit the plain and reasonable construction to be applied to the previous part of the clause, by which vehicles employed in carrying, or going for, manure, are exempt from toll.

In the present case there is no question that the carts were employed for the purpose of collecting manure: and it appears to this court that the mere circumstance of their carrying on the journey a few bundles of grass obviously as food for the bullocks drawing the carts, cannot divest the carts so employed of the privilege conferred by the Ordinance.

See P. C. Colombo, No. 69,807, Civil Minutes, 8th September, 1863.

November, 10th.

Present :—CREASY, C. J., TEMPLE, J. and STEWART, J.

D. C. Colombo, No. 43,479. } *Muttaya Chetty* v. *Vanderstraaten.*

Salary of public servant—agreement to make it attachable—validity thereof.

Defendant by his bond mortgaged among other things, the monthly salary accruing to him as a public servant and made it subject to be attached for the debt due to the plaintiff. Plaintiff having obtained judgment, moved for a rule on the defendant to shew cause "why his salary, or so much of it as the court shall think proper, should not be seized in satisfaction of the balance due upon the writ."

The district judge ordered that £1 5*s.* be attached monthly out of defendant's salary of Rs. 120.

Plaintiff appealed. *Ferdinands* appeared for defendant respondent.

The Supreme Court affirmed the order in these terms :—

The protection given to an officer's salary, subject to the discretion of the court, is given for the benefit of the public, and a creditor cannot nullify it by getting a mortgage of the salary inserted in the bond.

November, 17th.

Present:—CREASY, C. J., TEMPLE, J., and STEWART, J.

D. C. Kandy, No. 45,254 } *Paranatale* v. *Punchy Menica.*

Application for new trial—discovery of fresh evidence—power of Supreme Court to grant new trials—last will in several sheets—signature and attestation thereof—presumption of

On appeal by plaintiff against a decree of nonsuit, *Morgan, Q. A.* (with him *Alvis*) appeared for him, *Dias, Lorenz, Ferdinands* and *Cayley* appeared for defendants respondents.

The facts of the case appear in the following judgment of the Supreme Court :—

This appeal was argued before us in July last, a few days before be separated for our circuits. As the facts were rather long and complicated, the case required more examination and discussion among ourselves than we then could give to it, and it consequently stood over until we reassembled after the circuits.

On our intimating that we should give our judgment, a motion was made before us on behalf of the appellant for a new trial, on the ground of the discovery of new and material evidence. Such an application after argument is, to say the least of it, very unusual; nor should we be disposed to entertain it, unless on con-

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genuineness of the whole will, where last sheet only signed —such presumption rebuttable— necessity of calling all subscribing witnesses to a disputed will— *clausulae inconsuetae.*

sent by the other side, or unless it were most clearly shewn to us that no laches whatsoever was imputable to the applicant, and that great and irremediable hardship would result from our refusal. Indeed it is to be remembered that no express power has ever been given to the Supreme Court by Charter or Ordinance to grant new trials for the purpose of fresh evidence being produced. We are an appellate court, and our strict function is to correct errors of the courts below. But the district courts have no power to grant new trials, and extreme injustice would sometimes be done if a new trial could not be had, when new matter has come to light, which clearly shows the former decision to be against the party who is morally entitled to succeed, and the existence of which could not have been ascertained by any reasonable enquiry and diligence at an earlier stage of the proceedings. In such cases we have directed new trials, or further hearings before the court below. But the present case is by no means a case of the kind. The applicant here is a plaintiff who has been nonsuited. Prescription will not bar him for sometime yet to come; and it is open to him to bring a fresh action in which the value of his alleged new evidence, can be fairly tested. His affidavit also is very unsatisfactory. The general nature of the new evidence which he wishes to adduce is, proof that certain devisees under the will, by virtue of which his vendor claimed, took possession of the lands devised to them by the will. Now, his own examination at the trial shows that his purchase was mere speculation; that he bought for the nominal sum of £250 land of far greater value; and that of this £250, he only paid £50, the £200 being secured by a bond, which is only to be payable if he gets possession of the land. In the same examination he admits that he knew that this vendor, Delwille Banda, never had possession of the land. His words there are as follows: " At the time of my purchase I knew the defendants were posses- " sing the land in question. They have been in possession for the " last 15 years. I never knew Delwille Banda to live with the 1st " defendant from the time he went to Saffragam, which was I think " in 1853; since then 2nd defendant has lived with 1st defendant " as his wife. Delwille Banda told me of the disputed title at the " time the proposition for my purchase was made." And, in the evidence given by the vendor, Delwille Banda, at the trial, that person says as follows: " I never had possession of the lands I " sold to plaintiff either by myself, Menikralle or other, since the " time the widow died in 1861."

It is to be observed that the alleged testator's widow had a life estate in the property under the will, if the will was genuine; and, independently of the will, if the instrument was spurious. The estate in remainder claimed by plaintiffs vendor under the will,

could not vest until 1861; and it was, therefore, specially material to show that he never had possession since the widow's death in 1861. 1868. Nov. 17.

Yet, with this admission of his own, and this evidence of his vendor's on the record, the plaintiff has the effrontery to swear in the 5th paragraph of his present affidavit. "That the said lands "so transferred to the said Menikralle, as well as the land given "by the said will to the other devisees, (of whom his vendor "Delwille Banda was one,) have since the death of the testator "been *in* their respective possession, and in the 9th paragraph he "swear that save and except the fact of the land sold to him "having been possessed by his vendor Delwille, this affirmant was "wholly ignorant of the facts above stated until after the hearing "of this case in appeal."

This deliberate lie about Delwille Banda's possession disentitles the whole affidavit to credit; and even independently of this taint of mendaciousness, the affidavit is open to the remark that the plaintiff, a speculative purchaser, who knew the property to be held adversely to his vendor, and who knew that the holders would dispute the validity of the will, must have been aware of the importance of ascertaining whether on the death of the widow the will was acted on by the devisees in remainder taking possession. If he forbore to make enquiry, it must have been because he had a shrewd idea that questions on the subject were likely to receive unpleasant answers. Such wilful ignorance cannot entitle a litigant to a new trial for the purpose of adducing newly discovered evidence.

Rejecting, therefore, this application, we proceed to deal with the main point in the case, namely the genuineness or spuriousness of the will, under which the plaintiff's vendor makes title: that is to say, of those portions of the will which contain the devisees in question.

The will purports to be the will of Unambuwe Udapalatea Dissawa, a Kandyan chief of ancient lineage, and large landed estate, who did on the 5th of February 1846. The will purports to have been made on the 31st of January preceding. The will is not a notarial instrument, but was prepared by one Tikery Banda, a principal personage in the transactions which we are investigating. It is attested by 12 witnesses, being more than twice the number required by law for the validity of non-notarial wills. The will is on four sheets of paper. The last sheet, which bears the signatures of the testator and of the 12 witnesses is unquestionably genuine. The first three differ from the fourth as to the kind of paper on which they are written, and as to the appearance of the ink. None of these three sheets is signed or initialled by the testator or by

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any of the witnesses. It is in these first three sheets that the devises, which are material for the decision of the present case, occur.

Where a will consists of several sheets, our law, like the English, requires the concluding sheet only to be signed and attested, and we consider that we are bound to follow the rules of English law here in this matter, according to which it is not only unnecessary that all the sheets should be signed by the testator, but it is enough if they were in the same place, and it must be presumed *primâ facie* that they were so. It is also, by the same rules, held sufficient as to attestation, if the last sheet alone be attested by the witnesses provided the whole be in the place. The English law also holds that, in such a case, it is a question of fact whether all the papers constituting the will were in the place, and further, that the presumption is in the affimative. See *Williams* on *Executors,* vol. 1. p. 73 and 84.

As in this case there is no real question about the due execution and the genuineness of the last sheet of this will, it seems to us that we must start with a *primâ facie* presumption in favor of the genuineness of the first sheets also. This was not adverted to in the court below either by the bar or the bench, nor was it adverted to on behalf of the appellant in the argument before us. But we feel bound to give it its due effect, though no more than its due effect. We could not uphold this nonsuit unless we were prepared to go much further than the learned district judge in pronouncing on the spuriousness of the first sheets of this will. The learned district judge has expressly guarded himself from doing so. He has nonsuited the plaintiff, because the plaintiff has failed to satisfy the conscience of the court of the genuineness of the entire will. The whole burden of proof is thus treated as resting on the upholder of the will, which we think erroneous in a case where the last sheet is unmistakeably and indisputably genuine.

After ascertaining this, we proceed with a *primâ facie* presumption in favor of the entire will. But that presumption is *primâ facie* only, and it is liable to be overborne by cogent facts and arguments on the other side. After careful examination of all the case, we are all three thoroughly convinced that the will which Unambuwe executed on the 31st of January 1846 was tampered with and garbled after execution, and that the first three sheets of the present instrument are forgeries.

We will first look to the position of the testator and his family, at the time of the preparation of this will.

Unambuwe was a Kandyan chief of high family and large estates. At the date of this will his wife was living. His

only living children were two daughters, the eldest named Kumarihamy, and the youngest named Menika. 1868. Nov. 17.

Kumarihamy was married in deega to a wealthy Kandyan chief named Molligodde. Menika was married in beena to a man from Saffragam named Delwille Banda. According to the Kandyan rule of inheritence in case of intestacy, Kumarihamy would, as a deega married daughter, inherit nothing, but the whole property would devolve, (subject to the widow's life interest,) on the beena married daughter Menika, who would take it absolutely in her own right, her beena husband acquiring no interest it it.

There was also a step-daughter of Unambuwe living at the date of the will, who was married to one Tikiri Banda, a relative of the testator, who was then residing in the same house with the testator, and by whom the will in question was prepared. In case of intestacy this step-daughter would have taken nothing. Considering the well-known ancestral pride of the Kandyan chiefs, and the desire almost invaribly shown by them to maintain the importance of their families by keeping their estates together, we cannot help thinking it extremely improbable that Unambuwe should have wished to break his property in halves by willing away a moiety of it to the deega married daughter, contrary to his country's customs of inheritance. It is not as if that daughter had been in poverty. On the contrary, her husband Molligodde was a man of wealth, so much so that Tikiri Banda, the preparer of the will now before us, thought it worth his while to take part in the forgery of a will from Molligodde in favor of Kumarihamy. Tikiri Banda married Kumarihamy in 1848, and was convicted and transported for the utterance of this forged will in 1849.

It is also extremely improbable that Unambuwe should have designed not only to dismember his estate by taking half of it from Menika, the natural heir, to give it to Kumarihamy, but that he should have also wished to subdivide Menika's share by giving her beena husband Delwille Banda an equal right with her in it.

That he should have wished to make a will with some bequests, for religious purposes, with some small bequest to his step-daughter, to some of his friends and old servants, and with some donations to Kumarihamy as marks of esteem, but leaving the bulk of his property unimpaired in the hands of his customary heirs is natural enough. But the will before us is of a different character. After some unimportant bequests for religious purposes, it gives the widow the life interest in the property, (which she would have had in case of intestacy,) and then come the material devises. The will gives to the deega married daughter Kumarihamy, (whom Tikiri Banda subsequently married,) a large number of lands, garden, and other tenements by name. Their joint value is admitted to be equal to

1868. Nov. 17. nearly one-half of that of the testator's whole estate. It then gives other properties, (about equal to nearly the other half of the estate,) not to Menika solely, but to Menika and her beena husband Delwille Banda jointly.

All this is comprised in the first three sheets of the will, the genuineness of which sheets is disputed. The fourth sheet (which is certainly genuine) contains some small bequests to friends and dependants, the appointment of executors, and the execution and attestation clauses. It will be observed on looking at the will that the paper on which this last sheet is written is of a different kind from that of the paper on which the three first sheets are written. The sheets are connected by tape secured by a seal adhering to the back of the last, the genuine sheet; but it would be obviously easy to withdraw any of the preceding sheets and introduce a substitute for it. It further appears on examination of the will that the last page of the third sheet, (*i.e.* of the last of the suspected sheets) has been written with the paper turned over the wrong way as if in haste; and it appears that the writer of this last suspected page crowded his words and lines together much more than he had done in the other pages, as if he were anxious to conclude the whole of a particular subject in this particular page.

The first page of this genuine sheet begins with a fresh paragraph on a subject quite unconnected with the subject of the last paragraph at the foot of the preceding page, *i.e.* of the last of the suspected pages; and it is noticeable that the subject of this last paragraph, the whole of which the writer was seeming be desirous to crowd in, is a bequest in favor of one Menikralle, a person evidently closely connected with Tiriki Banda, who helped Tikiri Banda in getting together the deeds for the preparation of this will, and who was afterwards tried and convicted jointly with Tikiri Banda for the utterance of the forged will purporting to be the will of Molligodde. This appears on Tikiri Banda's own evidence.

We now resume the history of the preparation and execution of the will now in question, that of Unambuwes.

Unambuwe was ill of the small-pox. His illness proved mortal, but it does not seem that immediate or even speedy death was expected on the 31st of January 1846, when Tikiri Banda prepared the will. The infectious nature of the malady is given as the reason why no notary was employed. The reason is not altogether satisfactory. There would have been no difficulty in Tikiri Banda conveying to a notary the instructions which he says he took down in writing from the testator's lips; and we scarcely think that a notary could not have been found who would have prepared a regular will from such instructions, and who, for the sake of pay and professional introduction to such a family

as this great chief's, would have braved the risk of a short interview with the sick man, during which he would have read over to him the will, and seen to its execution in regular form. It is specially inconsistent with the supposed notarial dread of small-pox to find that 12 witnesses, being considerably more than the requisite number, were readily induced to come into the sick man's presence, and attest the execution of the last sheet of this will. Whatever may have been the cause it is certain that Tikiri Banda had the sole manipulation of the will, except so far as helped by Menikralle; and that according to the sheets which now appear first in the will, large wealth is bequeathed to Kumarihamy, the woman whom Tikiri Banda, two years after, married. When it was that the forgery of Molligodde's will in favor of Kumarihamy was schemed and perpetrated, does not clearly appear. The date of that forged will is laid as in April 1845, but as the whole instrument was a forgery, that date proves nothing. Molligodde died in 1841; Tikiri Banda married Kumarihamy in 1848, and in 1849 he was transported for the forgery of Molligodde's will by means of which, if genuine, as by means of the will now before us, if genuine, great wealth would have come to Kumarihamy, whom Tikiri Banda married. It has been argued that to suppose that he, Tikiri Banda, schemed all this implies that he also schemed a double murder: that he must have schemed the death of his own first wife, and also the death of Molligodde, in order to enable him to get any benefit from forged bequests in favor of Molligodde's wife. But this is not quite correct. At the time when these events happened, the Ordinance No. 23 of 1849, which assimilated the law of the Kandyan provinces, as to polygamy and divorce, to the law of the Maritime provinces, had not been enacted. Kandyan married people could, before 1859, take new wives or husbands, and could get rid of old ones with facility and legality.

According to Tikiri Banda's own account of the preparation of the present will, Unambuwe gave him instructions for it about 2 years before his, Unambuwe's death. Tikiri Banda prepared a draft will, and when Unambuwe was satisfied with it, Tikiri wrote out from it the document which was executed. It would be of course very desirable to see this draft. It is not produced. Tikiri says when he left the country 18 years ago, (that is to say, when he was transported) he left it in his box; and though he has seen the box since his return, he has not seen those papers. It is observable that he does not say that he has looked for them in the box.

Tikiri-Banda goes on to describe the place when the will was executed in the presence of the 12 witnesses. He adds a statement that a number of people were summoned together in the compound adjoining to the verandah in which the will was executed,—" In

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order that the thing might be as public as possible." He says that the Dissawe Unambuwe specially sent for the people, but the will contains some elaborate and suspicious recitals on this subject. The attestation clause says that "the witnesses have put their signatures in the presence of a great concourse of people;" and further recites, "that this instrument has been written and publicly "read and explained several times by Tikiri Banda Dunuwille "residing at Unambuwe." All these ostentatious assertions of the honesty of the proceeding look to us very like the devices of a man who was planning and who was perpetrating dishonesty.

We must now advert to the fact that only three out of the twelve attesting witnesses were called at the trial. The absence of four more seems to be accounted for; but still there remain five who might have been called, but were not called. It is well known that the English courts of law and of equity follow different rules as to the necessity of calling all the producible subscribing witnesses to a disputed will. Ours are courts of equity as well as of law, and we certainly should wish the practice of the English equity courts to be followed in this respect: especially as now all issues of fact as well as of law are in practice determined in our courts by a single professional judge, and there is not the risk which there might be before a popular tribunal of an honest litigant being irreparably prejudiced by an attesting witness turning traitor. At any rate we should expect, in such a strange case as the present to have some fair reason why the whole eight available witnesses were not called. All we have is a suggestion that some of the eight had been seen associating with the opposite party. That suggestion is in no way verified. It probably emanates from the plaintiff himself who seems not to be likely to be more scrupulous in making such assertions than he has been in his affidavit about his vendor's possession.

Of the three witnesses who have been called two merely speak formally to their own signatures and the execution by the testator. The third witness Loku Banda is certainly more explicit. He affirms not only to the execution of the will, but that he, Loku Banda, took the will after execution and read it over to the testator's children; and he further affirmed that the will, then before him in the district court, was the will which he had so read over. But this Loku anda is Tikiri Banda's own brother; and Loku Banda's own conduct looks very much as if he entertained shrewd suspicions, to say the least of it, as to the honesty of the will, in the state in which it was propounded for probate. Loku Banda was named co-executor with Tikiri. Tikiri took out probate on behalf of both; but Loku Banda from first to last has steadily abstained from in any way acting as executor. Such a refusal to

comply with a testator's wishes is not generally considered respectful towards their testator's memory or towards the family. And it looks as if Loku Banda must have had some secret motive for putting this seeming slight on a family of such dignity as that of Unambuwe, a family moreover with which he was nearly connected by relationship. It is said that while Tikiri was in the island and acting, there was no absolute necessity for Loku Banda to act. Perhaps not. But when Tikiri was transported why did not Loku come forward and move in the matter pursuant to the order in the testamentary case to which the district judge refers in his judgment? It is urged again that so long as the widow and tenant for life was alive, there was nothing for the executor to do. But the widow died in 1861, Tikiri was then still a convict at the Straits; and there was a great deal for Loku to do, if he believed the will to be honest. He ought to have wound up the estate, to have put the devisees in remainder in possession, and passed the testamentary accounts. He did nothing whatever. Only one cause for his inaction seems rationably credible. 1868. Nov. 17.

We go back to the history of the will. Tikiri says that his brother brought it back to him after he had read it to the children in the evening after it was made, *i.e.* on January 31st 1846. On the 5th February following, Unambuwe died. On the 18th of that same month Tikiri produced it in court, and the court's endorsement on it shows clearly that it then was as it is now. The forgery and substitution of sheets must have been made (if at all) in the short interval before the 18th of February. This may explain the hasty manner in which it was done, the use of different paper, the turning the last page of the third sheet upside down, and the crowded way in which that last page has been written.

Much stress has been laid on Tikiri Banda having been allowed to get an order of court for the sale of a small portion of the property. We see little importance in this. It was known that the testator had made a will, and probably until the affair of the forgery of Molligodde's will was detected, Tikiri was not suspected by the family of misconduct about Unambuwe's will.

In 1847 Molligodde, Kumarihamy's husband died, and in 1848 Tikiri Banda married her. What had become of his own first wife, Unambuwe's step-daughter, does not appear, and is not material. But now it was that Tikiri Banda got into trouble about a forged will of Molligodde. A will was propounded by which Molligodde purported to leave great property to Kumarihamy, whom, as we see, Tikiri Banda married. Tikiri appeared as one of the executors of this will, and Menikralle who had helped Tikiri in the preparation of Unambuwe's will, appeared as an attesting witness. This will was a forgery, and Tikiri and Menikralle were convicted

1868. Nov. 24. — at a criminal session of this court in 1849 for the guilty utterance of that will. They were both transported; Tikiri's sentence being for 14 years.

We now turn to the other members of Unambuwe's family: his daughter Menika, (who is first defendant in the present suit,) and her beena husband Delwille Banda, the vendor of the plaintiff in this suit. Some time after her father's death, Menika exercised her prerogative as a beena wife, dismissed Delwille Banda, and took to herself another husband, who is now the 2nd defendant in the present suit. Delwille Banda retired to his own country in Saffragam, and when the testator's wife died he took no steps to assert his rights under the will. The defendants continued in quiet possession of the property in question, and nothing whatever was done by Delwille Banda about it, until his sale to the present plaintiff in 1865. This date is ominously near the date when Tikiri Banda's term of transportation ended, which must has been in 1863. It is observable that Tikiri, though deeply interested in establishing the genuineness of the entire will, does not appear to have taken any steps to enforce his wife's and Molligodde's claims under it. But it would obviously be a great advantage for him if the genuineness of the whole will were upheld by a court of justice in the present action, and when we look to the speculative character of the plaintiff's purchase, on which we commented in the early part of this judgment, and the whole conduct of the parties, it is difficult not to believe that Tikiri Banda is the real originator of this litigation. But, however that may be, we feel no doubt as to this being a fraudulent claim, or as to the first three sheets of this will being forgeries.

The result is that the judgment of non-suit is affirmed.

November, 24th.

Present :—Creasy, C. J., Temple, J., and Stewart, J.

D. C. Colombo, No. 49,302 } *Pedro Pulle* v. *Mu. Ku.*

Pro. note—notice of dishonor—dispensation thereof, from

Action on a promissory note by endorsee against the endorser.

Plea: note not duly presented to maker, nor did defendants receive notice of dishonor.

Plaintiff proved that the note fell due on the 22nd January 1868, that he served the notice of dishonor through the defendant

on the maker; that the maker being unable to pay the defendant asked for time and promised to pay, but did not. 1868. Dec. 3.

The district judge non-suited plaintiff.

subsequent conduct of parties.

On appeal (*Lorenz* and *Ferdinands* for plaintiff appellant, *Cayley* for respondent), the Supreme Court set aside the decree and entered judgment for plaintiff as prayed. It observed,—

It seems to the Supreme Court that the evidence of the conduct of the parties, and of the subsequent promise to pay was strong proof in the favor of the plaintiff, from which a dispensation of the presentment might have been, and should have been inferred. See *Cordery* v. *Colville*, C. P. Jurist, 1863, p. 1,200.

It is proper in such cases to watch narrowly the witnesses who speak to conversations of this nature.

But here there seems to be no doubt of the veracity of the evidence.

December, 3rd.

Present:—CREASY, C. J., and STEWART, J.

D. C. Jaffna, No. 16,643 } *Manuel Pillai* v. *Saveremuttu.*

First defendant appealed. *Lorenz* for him, and *Dias* (*Cayley* with him) for respondent.

Prescription—minors—applicability of saving clause of Ordinance, where there are guardians.

The Supreme Court affirmed the decree as follows:—

This case has stood over for sometime to give an opportunity for an old decision to be produced, in which the court is said to have ruled that the saving clause in the Prescription Ordinance in favor of infants does not apply where there have been executors and guardians.

No such decision has hitherto been bound; and as at present advised, we should be slow to follow it even if produced. It seems to us that to do so would be for this court to repeal a clear enactment of the legislature.

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December, 3rd.

Present :—CREASY, C. J., and STEWART, J.

B. of M. Kandy, No. 2,381. } *Crusz* v. *Carre.*

Ordinance No. 17 of 1865, cl. 55 —"kept or used"— liability of carts &c. to pay tax.

On appeal by defendant (*Ferdinands* for him), his conviction was quashed in these terms:—

This case raises the question whether owners of carts, who reside out of the Municipality of Kandy, and who keep their carts, and who principally use their carts outside the limits, but occasionally use their carts within the Municipality are bound to pay the Municipal tax for such carts.

The Ordinance in question, (No. 17 of 1865, sect. 55) authorizes the Municipality to tax "carriages, carts, horses &c. kept or used within the Municipality."

According to well-known legal rules these words must be construed according to their plain common meaning, unless a literal construction would lead to manifest absurdity and injustice.

It is also a rule to adopt such a construction, if possible, as shall make every word operative.

It is also a rule in the construction of statutes which impose taxes, if the words are doubtful, to decide in favor of the subject, and against taxation. Let us apply these rules to the Ordinance before us, and see what is the true meaning of the words "used within the limits."

It is evident that, to construe literally, the word "used" would be unreasonable and unjust. If that were done the Kandy Municipality would have a right to tax or fine any man wherever resident, who on any occasion within the year sent his cart just within their limits, or rode his horse, or drove his carriage for a few yards within them.

This cannot be the meaning. But it does not follow that the word "used" is to be treated as mere surplusage. It is obviously inserted to meet a probable state of facts. A man might purposely have his stable and cart sheds just outside the limits of the Municipality, and employ his carts and horses continually within the Muuicipality. He clearly ought to pay the Municipal tax; and he would be made to pay them by the Ordinance which fixes the taxes on carts, horses, &c. kept or used within the Municipality.

Extreme cases like these are easy to determiue. Many intermediate cases will occur, some of which it may be difficult to classify. But the best rule is to treat the matter as one of common sense and common fairness, and to consider whether the hackery or

horse, &c. is regularly and principally used within the limits of the Municipality, though it may be occasionally used elsewhere; or whether it is regularly and principally used within them. Such mere occasional user will not make it liable to the Municipal taxation, but if principally and regularly used within the limits of the Municipality, it ought to be taxed.

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In the present case, the use of these estate carts within the Municipality was clearly occasional only, and the conviction was therefore wrong.

We have thought it more generally useful to give our judgment on the meaning of the Ordinance, on which all valid bye-laws of this kind must depend, than to criticise the mode in which these particular bye-laws have been framed and worded.

D. C. Colombo, No. 46,627. } *Armitage Brothers* v. *The Peninsular & Oriental Steam Navigation Company.*

Contract—shipping—covenant to convey cargo by one steamer and carriage by another—delay in execution of—damages—measure of

This case, which was carried in appeal on the question of jurisdiction as reported at p. 298 *ante*, now came up on the merits.

The facts connected with the merits are sufficiently indicated in the following judgment of the Supreme Court.

Dias appeared for plaintiffs respondents, *Morgan*, *Q. A.* (with him *Lorenz* and *Cayley*) for defendants appellants.

The following is the judgment referred to :—

We agree with the decision of the learned district judge in this case, as to the defendant's breach of their contract with the plaintiffs, and as to the measure of damages.

The plaintiffs' contention is, in substance, that the contract was a contract for the defendants, in consideration of certain freight, to take on board the steamer *Malacca*, then lying in Mazagon harbour and about to sail on the 6th of November, and represented by the defendants as about to sail on that day, and which did sail on that day, 12,000 bags of rice for the plaintiffs, and to forthwith carry the said 12,000 bags of rice by the said *Malacca* with all reasonable and practical speed to Colombo for the plaintiffs. That the defendants refused to receive and convey by the *Malacca* 6,000 odd of the said 12,000 bags, and only received and conveyed by her 5,000 odd of the said bags, and sent the 6,000 odd bags by another vessel, the *Bombay Castle*, which left Mazagon harbour later than the *Malacca*, and reached Colombo a considerable time after the *Malacca*, and that the market price of rice at Colombo having fallen greatly between the arrival of the *Malacca* and the arrival of the *Bombay Castle*, the plaintiffs got a far less price for

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those bags than they would have got if the defendants had kept their contract and had carried the whole 12,000 bags, as agreed by the *Malacca.*

The defendants answer is, in substance, that there was no contract to convey the rice by any particular ship, or at any particular time, but that all the defendants contracted to do was to carry the rice from Mazagon, *i.e.*, Bombay, to Colombo, and deliver it at Colombo in a reasonable time; and that they did so convey and deliver it in a reasonable time, and to the satisfaction of the plaintiffs' agent.

A careful examination of the evidence satisfies us beyond all doubt that the truth of the case is on plaintiff's side. If we take only the letters and the parol evidence of the defendants' own agent captain Parker, we find abundant proof in favor of the plaintiffs as to the nature, and as to the breach, of the contract. The same witness thoroughly disproves the assertion made on behalf of the defendants that the plaintiffs by their agent assented to the defendants' conduct, and waived their right. The defendants had probably miscalculated the carrying capacity of the *Malacca.* They certainly mis-stated it to the plaintiffs' agent, who enquired carefully and specially about it before he made the contract. This miscalculation was probably the main cause why the 6,000 odd bags were shut out, though there is also some evidence that the defendants took on board cotton for China, to the wilful exclusion of some at least of the plaintiff's rice. But certainly the shutting out of the 6,000 odd bags of rice from the *Malacca,* and the sending the vessel off without them, was a wrong to the plaintiffs for which the defendants are legally responsible. The defence that the shutting out of the rice was caused by the plaintiffs' delay in sending it to the *Malacca,* and the defendants' claim in reconvention were evidently mere after thoughts, having no foundation in fact, and not very creditable to those who set up such pretexts for resisting the plaintiffs' claim.

We now come to the question of the measure of damages, which is more difficult, but we think, after reflection, that it has been rightly fixed by the learned district judge. He has not given any compensation for profits, which the plaintiffs might have made by any speculative or special contract in case the 6,000 bags had come by the *Malacca,* but he has given the difference between the market value of rice at Colombo when the *Malacca* arrived, and the market value when the *Bombay Castle* arrived. This seems to us to be correct, according to the modern authorities on the subject, which are, we believe, all collected in the notes to the 6th edition of *Smith's Leading Cases,* vol. ii. p. 500, et seq. See particularly the case of *Wilson* v. *The Lancashire and Yorkshire Railway Com-*

pany, L. J. xxx, C. P. 232. The words of *Mr. Justice Keating* at p. 235, give a simple rule which embraces the present case. "I "think in estimating the damages, there must be taken into con- "sideration the difference in the value of the commodity at the "time when it arrives, from what it would have been had it arrived "when it ought to have arrived." 1868. Dec. 3.

Present :—CREASY, C. J., and STEWART J.

D. C. Colombo, No. 41,276. *The Chartered Mercantile Bank* v. *Dickson, Tatham & Co.*

Provisional judgment—motion, without prayer therefor in libel—practice.

This was an action on a promissory note for £5,000 made by Sinne Lebbe Brothers in favour of the defendants and by them endorsed to the plaintiffs.

On the defendants admitting their signature to the endorsement, without denying presentment or notice of dishonor, plaintiff moved for provisional judgment.

Lawson, D. J. disallowed the motion, "as it was decided by Mr. Langslow in (D. C. Colombo 35,460) *Demner* v. *Van Eyck* that 'provision not having been prayed for in the libel, it could not be adjudged on application at a later stage of the suit,' and the rule there laid down has been uniformly acted on by this court ever since, the practice being to require an amendment of the libel, where provisional judgment is prayed for at a later period of the case."

On appeal, the Supreme Court affirmed (10th November 1865) the order as follows :—

It appears to us that the practice that has so long obtained in the district court of Colombo is not inconsistent with authorities on the law of namptissement and should be upheld.

If the prayer for the provisional judgment has not been made in the first instance, it is open to the plaintiff to apply to amend the libel so as to enable him to obtain the desired remedy.

Pro. note—action by endorsee against endorser—arrangement

The case was carried up again in appeal and was decided on the merits as against the first defendant, on the 3rd December 1868.

The following judgment of Lawson, D. J. sets out the facts pertinent to this appeal:—

"This case in which judgment has been already obtained against the 2nd defendant (C. Tatham) now comes on for hearing against

1868. Dec. 3. — between maker and endorser—knowledge and interest of endorsee in such arrangement—delay in presentment.

the 1st (T. Dickson.) It is an action by the endorsee against the endorsers of a pro. note payable on demand, and the defendant pleads (1) that he ceased to be a partner of the 2nd defendant after the endorsement of the note in the partnership name and before it was presented, and that no note of dishonor was given to him; (2) that the note was endorsed by defendants as sureties for, and for the accommodation of the makers, of which plaintiffs had notice, and that defendants are discharged by reason of time having been given to the makers, and also because the plaintiffs took fresh security from the makers for payment; (3) that there was undue delay in presentation; (4) that the note has been paid either in account with the makers or the other endorsers or by cross drafts with securities attached given by the other makers or the other endorsers; (5) that after the partnership between the defendants was closed, the plaintiffs adopted the new firm of Dickson Tatham & Co., consisting of 2nd defendant, as debtors and discharged the 1st defendant; (6) that the note was an accommodation note and that there was a clause in the defendants' deed of partnership, prohibiting the parties from making or endorsing accommodation bills or notes, and that plaintiffs were aware of the prohibition.

"The plaintiffs in their replication admit that notice of dishonor was given to the 2nd defendant alone, but deny all the other matters contained in the answer.

"On the first point, the court is of opinion that notice to the 2nd defendant was sufficient and was binding on the 1st defendant, for although the partnership between them was dissolved between the dates of the endorsement and that of the presentation of the note, yet their joint liability in respect of the note continued, and notice to one of several persons jointly liable on a bill or note is binding on all. (Byles on Bills, 216.)

"On the second, fourth, fifth and sixth pleas, the court also finds for the plaintiff.

"The note appears to have been not for the accommodation of the maker alone, but as part of an intended arrangement between the makers of the note and the defendants, from which the 2nd defendant expected to derive benefit for his own firm as well as to give facilities to the makers. It was part of an intended advance of £50,000 from the defendants which was to be secured by a mortgage over the property of the makers, and in consideration of which the defendants were to have the agency of the mortgaged estates.

"This arrangement was abandoned, but not until after the plaintiff had given value for the note; and the subsequent abandonment by defendants of this arrangement and their relinquishment of the benefit which they had expected to derive from it cannot alter the nature of the original transaction.

"Nor does it appear that the plaintiffs took fresh security for the note . . . .

"On the fourth plea, there is no evidence of payment in account or by cross drafts by the makers of the note . . .

"There is no evidence that the plaintiffs accepted the new firm of Dickson Tatham & Co. as their debtors in lieu of the old firm . . . Nor is there proof that the defendants were acquainted with the covenant in the defendants deed of partnership forbidding the partners to endorse accommodation notes.

"It remains therefore only to consider the third plea—that there was undue delay in the presentation of the note by plaintiffs, whereby the defendants were released. The promissory note sued on bears date the 10th of February 1864, and is made payable on demand. It was presented for payment on the 14th December, 1864. It is not necessary that "a pro. note payable on demand should be presented for payment the next day after it has been received in order to charge the endorsers, and when the endorser defends himself on the ground of delay in presenting the note, it will be a question for the jury whether under all the circumstances, the delay of presentment was or was not reasonable." Byles on Bills, 154. The court therefore has to consider whether there were circumstances in the present case which made it the duty of the plaintiffs to present the note at an earlier date than that actually chosen by them. The plaintiffs, it must be noticed, were bankers, and the makers and endorsers were all their customers. In January 1864, before the note was given, the first defendant complained to the manager of the bank in London of the conduct of the manager in Colombo, who had taken the drafts of the second defendant then managing the business of the firm in Colombo for large amounts without then being properly covered. The partnership between the first and second defendants was dissolved on the 30th June 1864, and the manager of the bank in London was aware of the dissolution. The manager of the Colombo branch must therefore have been aware of it early in August, probably about the 4th or 5th. The business of the firm was continued to be carried on by the 2nd defendant and the plaintiffs were employed by 1st defendant to receive from the 2nd the proceeds of his share in the partnership assets as the same were from time to time realised, and to remit them to him, and from August to December the bank was in constant correspondence with the 1st defendant as to the recoveries and remittances. During the whole of this period, the position of Sinne Lebbe Brothers, the makers of the note, was known to the managers of the bank both in London and Colombo to be most critical. The manager in Colombo was also aware that the negotiation between the defendants and Messrs. Sinne

1868. Dec. 3. — Lebbe Brothers respecting the advance by the former to the latter of a sum of £50,000, of which this £5,000, raised by means of the note, formed part, had been broken off. The dangerous position in which the maker of the note stood throughout the year 1864, the failure of the consideration which had induced the 2nd defendant to endorse the note, and the anxiety of the 1st defendant to close all his accounts with his late firm, were all reasons which should have induced the plaintiffs to lose no time in presenting the note.

"For these reasons, the court holds that there was unreasonable delay on the part of the plaintiffs in presenting the note sued on for payment and that by such delay the 1st defendant is discharged.

"The claim of the plaintiffs, so far as the 1st defendant is concerned, is dismissed with costs."

On appeal, *Cayley* for plaintiffs appellant, *Lorenz* for defendants respondent

The following is the judgment of the Supreme Court :—

If this had been the ordinary case of a note payable on demand given to bankers to secure advances to a customer, the Supreme Court would have probably held that the lapse of about 10 months before presentment did not bar the banker's right to recover either against the maker, or against an indorser, who indorsed the note immediately on its being made with a full knowledge of the purpose for which it was intended to be given to the bankers. See *Brooks* v. *Mitchell*, 9 Mees and Welsly 15; and the observations of Mr. Justice Byles in his work on Bills, p. 164 and 203, 9th edition. But this does not appear to have been a case of the kind. It is very difficult amid the conflicting evidence as to the complicated transactions between the bank, the defendants, Sinne Lebbe and Nanny Tamby, to ascertain the precise nature of the arrangement and conditions on which this note was made, endorsed and handed to the plaintiffs. But we think that the learned district judge has apprehended the substantial truth of the case when he states in his judgment after the second trial that, "the note appears "to have been given not for the accommodation of the maker "alone, but as part of an intended arrangement between the makers "of the note and the defendants, from which the 2nd defendant "expected to derive benefits for his own firm as well as to give "facilities to the makers; it was part of an intended advance of "£50,000 from the defendants, which was to be secured by a "mortgage over the property of the makers, and in consideration "of which the defendants were to have the agency of the mort-"gaged estate." We think it also clear that the bank knew that the arrangement was to be one for the benefit of the defendants, as well as for the benefit of the bank and Sinne Lebbe.

When this arrangement was abandoned and when all hopes of effecting any similar arrangement for the benefit of the defendants as well as for the benefit of the bank and Sinne Lebbe were at an end, which they certainly were long before December 1864, the bank had no right to treat this note as a continuing security as regarded these defendants. Whether they had then any right at all, against these defendants on the note seems extremely questionable; but they certainly ought to have either cancelled the note, or to have acted promptly in the matter against the proper parties, and not to have allowed Sinne Lebbe's affairs to go from bad to worse without making some attempt to enforce payment, or to obtain further security in respect of this £5,000, while they were vigilant as to other sums, in respect of which they had claims against Sinne Lebbe, but as to which they had not any notes endorsed by the defendants.

1868.
Dec. 3.